

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

NEXTEER AUTOMOTIVE
CORPORATION, a Delaware corporation,

Supreme Court No. 153413

Plaintiff-Appellee,

Court of Appeals No. 324463

v

Lower Court No. 13-021401-CK
(Saginaw County Circuit Court)

MANDO AMERICA CORPORATION, a
Michigan corporation, TONY DODAK, an
Individual; ABRAHAM GEBREGERGIS,
an Individual; RAMAKRISHNAN
RAJAVENKITASUBRAMONY, an Individual;
CHRISTIAN ROSS, an Individual; KEVIN ROSS,
an Individual; TOMY SEBASTIAN, an Individual;
THEODORE G. SEEGER, an individual;
TROY STRIETER, an Individual; JEREMY J.
WARMBIER, an Individual; and SCOTT
WENDLING, an Individual; jointly and severally,

Defendants-Appellants,
and

CHRISTIAN ROSS, KEVIN ROSS, TOMY
SEBASTIAN, THEODORE G. SEGER, and TONY
DODAK,

Counter/Third-Party Plaintiffs,

v

NEXTEER AUTOMOTIVE CORPORATION, a
Delaware corporation, LAURENT BRESSON, and
FRANK LUBISCHER,

Counter/Third-Party Defendants.

**DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF APPLICATION FOR
LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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Nexteer avoids the central question on appeal: whether Mando's agreement to a preliminary case management order should be deemed an express waiver. Nexteer instead repeatedly assumes that the CMO amounts to an express waiver for which no prejudice is required, and includes virtually no discussion about the Court of Appeals' proffered distinction between express and implied waivers, or their legal effect, if any. Nexteer does not explain why a party's agreement to ambiguous language in a preliminary case management order should be a waiver. Nor does Nexteer explain why, given the strong policy of enforcing contractually-agreed-to arbitration provisions and the longstanding requirement that a party claiming waiver of arbitration must show prejudice, Nexteer should not be required to show prejudice here.

The Court of Appeals' decision has nullified the presumptions in favor of arbitration and expanded the concept of waiver beyond traditional understandings in this State or any other jurisdiction. The decision creates uncertainty for litigants regarding this State's standards for determining waiver in at least two related ways. *First*, the Court of Appeals eliminated the element of prejudice from waiver analysis, inventing a distinction between express and implied waiver that this Court and the lower courts have not recognized. *Second*, the Court of Appeals and Nexteer define "express waiver" in a way that, if accepted, would unacceptably lower the waiver bar and place Michigan outside of the jurisprudential mainstream.

Nexteer offers only a half-hearted and conclusory assertion that the question presented does not involve a legal principle of significance to the state's jurisprudence. Review of Nexteer's brief reveals no support for the proposition that the Court of

Appeals' holding that no prejudice is required in the context of a so-called express waiver of arbitration is grounded in this Court's waiver doctrine. Nor does Nexteer show that this Court has ever issued a decision holding that prejudice is *not* required to avoid an arbitration clause.

Mando submits that the conduct at issue here does not constitute a waiver, express or implied, and that regardless, prejudice is required. In any event, given the importance of arbitration provisions, and the need for sophisticated global commercial entities to enforce such contractual provisions, and to be able to predict in advance the parameters of the waiver doctrine, this case is jurisprudentially significant.

ARGUMENT

A. Nexteer's argument is logically inconsistent.

1. Nexteer does not address the abundant record evidence of non-waiver.

Nexteer does not, and cannot, dispute that a waiver must be based on "clear and unmistakable evidence." *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 327; 550 NW2d 228 (1996); see also *Kauffman v The Chicago Corp*, 187 Mich App 284, 290; 466 NW2d 726 (1991) ("any doubts" concerning waiver "should be resolved in favor of arbitration"); *Whitley v Chrysler Corp*, 373 Mich 469, 474; 130 NW2d 26 (1964) (stipulations cannot be construed so as to "give the effect of waiver of a right not plainly intended to be relinquished"). While Nexteer insists that the Court of Appeals was correct, it ignores or offers only conclusory denials of the record evidence that the CMO was not a waiver, including:

- The fact that the trial court acknowledged during the hearing that “[the ‘is not applicable’ box] is different than waiver and that’s why it wasn’t checked.” Arbitration Hearing at 122 (Exhibit A);
- The fact that the box for “waived” is not checked; See CMO at 2 (Exhibit B);
- The CMO statement that it represents only a “preliminary” statement of the parties’ positions. *Id.* at 1;
- The fact that the CMO was plainly temporal and anticipated by all to be subject to amendment later in the case. For example, it initially limited discovery to a narrow threshold issue; *Id.* at 2; and
- The fact that the governing arbitration agreement permitted pursuit of injunctive relief *without* prejudice to arbitration, and the CMO was entered in the course of injunction proceedings.

Any conclusion that the record includes “clear and unmistakable” evidence cannot be reconciled with this evidence, which is, at best, conflicting. In that circumstance, Michigan courts have never held that a purported waiver is sufficient to bar enforcement of a contractually-agreed-to arbitration clause without evidence of prejudice, which is absent here.

Nexteer expends pages on red herrings such as factual stipulations and contract amendments, despite admitting that this quibbling is beside the point. Opp. at 15-16. The true issues are what constitutes a waiver, and whether prejudice is required on the facts of this case. On these key points, Nexteer is conspicuously silent.

2. Nexteer is wrong to argue that a preliminary CMO and an answer are not subject to later amendment.

A CMO prepared during a teleconference a mere three weeks into proceedings

for preliminary relief should be far less immutable than the more formal pleadings and other litigation conduct that Michigan courts have regularly found subject to change.

According to the Business Court itself, the CMO was not “set in stone,” and “could change.” Arbitration Hearing at 71 (**Exhibit A**); see also MCR 2.401(B)(2)(d) (“more than one” scheduling order can be entered in a case and parties have liberal right to seek amendment). Amendments of pleadings, too, are to be “freely granted.” See MCR 2.118(A)(2) and *id.* A(2)(d); see also *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239-40; 615 NW2d 241 (2000) (allowing affirmative defenses to be added during trial).¹ The CMO expressly reflects that – due to the expedited nature of Nexteer’s demand for emergency relief – Mando’s affirmative defenses were “not yet due” as of the date the conference was held, and says nothing about any limitation on them.

Mando’s Application cited *In re Charter Behavioral Health Sys, LLC*, 277 BR 54, 58 (Bankr D Del 2002), where the court held that the purpose of a case management order is to set a schedule, not to force the parties to waive substantive rights. Nexteer attempts to distinguish the case on the basis that the parties there provided that arbitration was not appropriate “at this juncture.” Nexteer’s attempted distinction fails because the CMO in this case contains qualifying language to the same effect --- *i.e.*, that it is “preliminary advi[ce].”

¹ Arguing by analogy, Mando also pointed out that, as with arbitration and other contexts, both Williston on Contracts and the Michigan Uniform Commercial Code make prejudice the litmus test for finding waiver. See Application at 20 (citing MCLA 440.2209 and 13 Williston on Contracts § 39:20 (4th ed.)).

Nexteer's own conduct shows that Nexteer did not view the CMO as fixed or unchanging. Nexteer served discovery requests ranging far beyond the narrow discovery the CMO authorized. The Business Court checked the box on the CMO that states that "an agreement to arbitrate this controversy exists," but Nexteer has regarded itself as free to deny that proposition ever since – including as recently as its Opposition to Mando's Application. See, e.g., Opp. at 2 (arguing that "Nexteer's claims are not within the scope of the NDA's arbitration provision"). Indeed, Nexteer placed so little weight on the CMO that it did not even mention it in opposition to Mando's motion to compel arbitration, seizing upon it only after the Business Court recalled its existence.

3. Absence of prejudice dooms Nexteer's waiver claim under this state's law as well as the Second Circuit cases on which Nexteer tries to rely.

Nexteer never made any showing of prejudice despite repeated opportunities to do so. Unable to cite one case from this State that dispenses with the requirement of prejudice, Nexteer resorts to mischaracterizing Second Circuit precedent. Opp. at 17. According to Nexteer, *Gilmore v Shearson/American Express, Inc.*, 811 F2d 108 (CA 2 1987) eliminates the prejudice requirement in this case. *Gilmore* does nothing of the sort.

In *Gilmore*, the Second Circuit created a limited exception to the prejudice requirement where plaintiff *conceded* that it had waived arbitration by first filing, then withdrawing, a motion to compel.² See 811 F2d at 112. The court emphasized, however,

² Cf. *Sofola v Aetna Health, Inc*, 01-15-00387-CV, issued Jan 5, 2016 (Tex App--Hous [1st Dist]) (**Exhibit C**) (declining to extend *Gilmore* to situation where party did not concede waiver); see also *Ness Townhouses v Mar Indus Corp*, 862 F2d 754, 758 (CA 9 1988) (the test for waiver, which includes prejudice, "applies to both express and implied

that prejudice is required whenever the court must resolve ambiguity to determine whether conduct was a waiver. *Id.* In *Apollo Theater Found, Inc v W Intern Syndication*, 02 CIV 10037 (DLC), issued June 21, 2004) (**Exhibit E**), the court held the *Gilmore* exception applied to an equally extreme and unambiguous scenario, where the waiving party had not only completed discovery, but opposed an earlier motion to compel arbitration, stated that it “would gladly keep the parties' disputes before this Court” and underscored its own decision not to request arbitration early in the case.

B. Nexteer's position is only plausible if the Court accepts its inaccurate representation of the facts and law.

1. Nexteer's alternate theories of implied waiver are factually incorrect and legally meritless.

Nexteer argues that Mando also impliedly waived arbitration. Opp. at 24-27.

Yet again, Nexteer offers no legal support for its conclusory assertions, and fails to show the prejudice that Nexteer concedes is required in situations of implied waiver.

Nexteer relies entirely on cases where the plaintiff obtained a decision on the merits under MCR 2.116(C)(10). As the Business Court explained in detail, however, these precedents have nothing to do with this case, because Mando moved for

waiver”); *US Fire Ins Co v Walsh*, No Civ A 96-CV-8409, issued Jan 30, 1997 (ED Pa) (**Exhibit D**) (noting that waiver may be express or implied, but nevertheless, “should not lightly be inferred, unless one’s conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished that right”); *McLaughlin v CSX Transportation, Inc*, No 3:06CV-154-H, issued Aug 14, 2008 (WD Ky) (**Exhibit G**) (party may waive right to arbitration “either expressly or implicitly” but “will only be recognized . . . where the party opposing arbitration shows specific conduct completely inconsistent with an intent to arbitration and some prejudice to itself due to the subsequent demand of arbitration”).

summary disposition under MCR 2.116(C)(8). See Reconsideration Order at 7 (**Exhibit F**) (explaining that Business Court dismissal was for failure to state a claim, not for failure to show triable issue of fact).³ Contrary to Nexteer's assertions, seeking dismissal on the face of defective pleadings does not waive arbitration of the surviving claims, and courts, therefore, order arbitration of surviving claims. See *George S. Hofmeister Family Tr v FGH Indus, LLC*, No 06-CV-13984-DT, issued Oct 12, 2007 (ED Mich) (**Exhibit H**) (filing of four motions for dismissal did not waive arbitration; "Defendants [] attempted to minimize the number of counts that need to be . . . submitted to arbitration"); *Creative Solutions Grp, Inc v Pentzer Corp*, 252 F3d 28, 32-34 (CA 1 2001) (no waiver where party filed a motion to dismiss prior to moving to compel arbitration); *Williams v Cigna Fin Advisors, Inc*, 56 F3d 656, 661-62 (CA 5 1995) (same); *Rush v Oppenheimer & Co*, 779 F2d 885, 888-89 (CA 2 1985) (same).⁴ Moreover, Nexteer never sought reconsideration of, or appealed, the dismissal of its claims, and the claims would not be revived even if the case were remanded to the Business Court.

³ The Business Court narrowed Nexteer's nine causes of action to five by dismissing duplicative and poorly pleaded claims. Counts I and VI (breach of contract and violation of Michigan Uniform Trade Secrets Act ("MUTSA")) survived. Counts II, III, VIII and IX (tortious interference with business relations and expectations and employment contract, conversion, and civil conspiracy) were dismissed, in part, to the extent redundant of and preempted by Nexteer's MUTSA claim. Counts IV and V (breach of fiduciary duty and aiding and abetting same) were dismissed for failure to plead a cause of action. Count VII (unjust enrichment and quantum meruit) was dismissed in light of Nexteer's contract claim.

⁴ Nexteer incorrectly represents that motions to dismiss are not available in arbitration. The ICC provides for "partial awards on key issues" such as the lack of a claim for relief. ICC Rules, Appendix 4(a), (c) *available at* <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.

Likewise, though Nexteer intimates that Mando “t[ook] advantage” of discovery, Opp. at 27, Nexteer neglects to reveal that *no depositions were taken and no discovery was produced by either side* either before or after Mando made its motion to compel . See *SCA Servs, Inc v Gen Mill Supply Co*, 129 Mich App 224, 231; 341 NW2d 480 (1983) (serving defensive discovery does not waive the right to arbitrate). In any event, discovery is available in arbitration, as Nexteer itself conceded. See Arbitration Hearing at 32 (**Exhibit A**) (Nexteer’s attorney: “if you ask a lot of practicing attorneys they’ll tell you nowadays, Judge, you go to arbitration, you get the same discovery that you would get if you’re in court”).

2. Settled law supports arbitration of all Nexteer’s claims.

At least two separate legal doctrines support resolution of all of Nexteer’s factually related claims in the arbitration forum to which Nexteer “required” Mando to agree. Opp. at 6. *First*, a signatory to an arbitration agreement, such as Nexteer, may be compelled to arbitrate with non-signatories such as the employees here:

- (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a non-signatory; or
- (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract.

Tobel v AXA Equitable Live Ins Co, No 298129, issued Feb 21, 2012 (Mich Ct App) (**Exhibit I**) (quoting *Grigson v Creative Artists Agency LLC*, 210 F3d 524, 527 (CA 5 2000)).⁵ See also

⁵ Mando cites to this unpublished opinion (and has done so throughout the proceedings on this matter) because there is no published opinion that sets out the test

Rooyakker & Sitz, PLLC v Plante & Moran, PLLC, 276 Mich App 146, 163-64; 742 NW2d 409 (2007) (ordering arbitration of claims against non-signatories “even if [] nonparties to the agreement.”). Both prongs of this test are satisfied. Nexteer “makes reference to” the NDA containing the arbitration clause in its claims against the employees. See, e.g., First Amended Complaint ¶¶ 198-99 (**Exhibit J**) (accusing employees of conspiracy to “misuse” the NDA); ¶ 234 (accusing employees of acting together with Mando in “violation of the purpose and spirit” of the NDA). Nexteer also alleges “substantially interdependent and concerted misconduct,” including an alleged joint “disloyal scheme.” Nexteer Supplemental Brief at 4 (**Exhibit K**). See also Amended Complaint ¶ 149 (**Exhibit J**) (alleging “collaborat[ion]” between Mando and employees to poach employees and misuse alleged trade secrets); ¶ 234; Arbitration Opinion at 8-10 (**Exhibit L**) (discussing Nexteer’s allegations of interrelated conduct by Mando and employees).

Second, a signatory may be compelled to arbitrate against agents of a counterparty to the arbitration agreement. See *Javitch v First Union Securities*, 315 F3d 619, 629 (CA 6 2003). Here, Nexteer alleges that the individuals were acting as agents of Mando even before they resigned. See Amended Complaint ¶ 212 (**Exhibit J**) (alleging employees agreed to accept wage increases from Mando in exchange for information while employed by Nexteer); Transcript of January 24, 2014 Hearing on Defendants’ Motion to Dismiss (“MTD Hearing”) at 46-47 (**Exhibit M**) (Nexteer attorney: “We’ve

for when a signatory may be compelled to arbitrate with non-signatories. See MCR 7.215(C)(1).

alleged the whole scheme where Mando and the individual defendants surreptitiously worked together while. . .the individual defendants were Nexteer's employees to create a competing operation and that spawns a lot of claims. . .").

The Business Court did not "add parties" to the arbitration agreement, Opp. at 2, but correctly ordered that all of Nexteer's claims arising from the same alleged joint course of conduct should be arbitrated in one action. Moreover, the Court of Appeals did not address, let alone overturn, the Business Court's conclusion that Nexteer could be required to arbitrate its claims against the individuals. Nexteer failed to file any cross application, and this issue need not be addressed for the Court to decide the issues presented by Mando.

3. Arbitration of Nexteer's claims is not inconsistent with the goals of arbitration or the text of the NDA.

Nexteer's complaints that the Business Court retained the Individual Defendants' counterclaims do not justify reversal of the Business Court. Nexteer is in no danger of litigating simultaneously in two fora, because the counterclaims are stayed pending the outcome of arbitration. Stay Order at 3 (**Exhibit N**); *Air Line Pilot Ass'n v Miller*, 523 US 866, 879 n 6 (1998) (courts have "discretion to defer discovery or other proceedings pending the prompt conclusion of arbitration"). Arbitration will most likely determine the outcome of those counterclaims, and further litigation of the counterclaims is speculative at best. Nor is there any force to Nexteer's objection that the Court "rewrote" the agreement by providing for arbitration hearings in Detroit, because Nexteer agreed to that location as authorized by the ICC Rules. (**Exhibits A and O**) (Nexteer attorney: "if it is arbitrated we would want it here in Michigan for sure").

Respectfully submitted,

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Dated: May 31, 2016

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STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

NEXTEER AUTOMOTIVE
CORPORATION, a Delaware corporation,

Supreme Court No. 153413

Plaintiff-Appellee,

Court of Appeals No. 324463

v

Lower Court No. 13-021401-CK
(Saginaw County Circuit Court)

MANDO AMERICA CORPORATION, a
Michigan corporation, TONY DODAK, an
Individual; ABRAHAM GEBREGERGIS,
an Individual; RAMAKRISHNAN
RAJAVENKITASUBRAMONY, an Individual;
CHRISTIAN ROSS, an Individual; KEVIN ROSS,
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WARMBIER, an Individual; and SCOTT
WENDLING, an Individual; jointly and severally,

Defendants-Appellants,
and

CHRISTIAN ROSS, KEVIN ROSS, TOMY
SEBASTIAN, THEODORE G. SEGER, and TONY
DODAK,

Counter/Third-Party Plaintiffs,

v

NEXTEER AUTOMOTIVE CORPORATION, a
Delaware corporation, LAURENT BRESSON, and
FRANK LUBISCHER,

Counter/Third-Party Defendants.

/

**EXHIBIT LIST TO DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

EXHIBIT	DESCRIPTION
A	Transcript of Hearing on Motion to Compel Arbitration, 6/3/14
B	Case Management Order
C	<i>Sofola v Aetna Health, Inc</i> , 01-15-00387-CV, issued Jan 5, 2016 (Tex App--Hous [1st Dist])
D	<i>US Fire Ins Co v Walsh</i> , No Civ A 96-CV-8409, issued Jan 30, 1997 (ED Pa)
E	<i>Apollo Theater Found, Inc v W Intern Syndication</i> , 02 CIV 10037 (DLC), issued June 21, 2004 (SDNY)
F	Opinion and Order Denying Nexteer's Motion for Reconsideration of Order Granting Mando's Motion for Leave to File Amended Answer and to Compel Arbitration of All Claims, 10/14/14
G	<i>McLaughlin v CSX Transportation, Inc</i> , No 3:06CV-154-H, issued Aug 14, 2008 (WD Ky)
H	<i>George S. Hofmeister Family Tr v FGH Indus, LLC</i> , No 06-CV-13984-DT, issued Oct 12, 2007 (ED Mich)
I	<i>Tobel v AXA Equitable Live Ins Co</i> , No 298129, issued Feb 21, 2012 (Mich Ct App)
J	First Amended Complaint
K	Nexteer Supplemental Brief
L	Opinion Re: Mando's Motion for Leave to File Amended Answer and to Compel Arbitration, 7/10/14
M	Transcript of Motion to Dismiss, 1/24/14
N	Stipulation to Stay Counter/Third Party Plaintiff's Claims Pending Further Order from the Court, 9/3/14
O	ICC (International Chamber of Commerce) Rules of Arbitration

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STATE OF MICHIGAN
IN THE 10th JUDICIAL DISTRICT COURT FOR SAGINAW COUNTY
NEXTEER AUTOMOTIVE
Plaintiff,
vs. Case No. 13-21401-CK
MANDO AMERICA CORPORATION, et al
Defendant /

NEXTEER'S MOTION TO DISMISS COUNTERCLAIM
MANDO'S MOTION FOR LEAVE TO AMEND COMPLAINT
BEFORE THE HONORABLE M. RANDALL JURRENS, ACTING CIRCUIT JUDGE
SAGINAW, MICHIGAN - Tuesday, June 3, 2014

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None

WITNESSES: DEFENSE

None

EXHIBITS:

IDENTIFIED:

RECEIVED:

None

1 Saginaw, Michigan

2 Friday, June 3, 2014 - 10:38 a.m.,

3 THE COURT: Court will take up the matter of Nexteer
4 Automotive versus Mando America Corporation, et al, Circuit
5 Court case number 13-21401-CK.

6 Appearances of counsel, please.

7 MR. WATSON: Jerome Watson appearing for plaintiff
8 Nexteer and counter-defendants Lubischer and Bresson.

9 MR. SAHU: Saura Sahu, and I'll spell it since it's
10 a little bit different, Saura, S-a-u-r-a Sahu, S-a-h-u.
11 Your Honor, appearing also for Nexteer Automotive as well as
12 counter-defendants Laurent Bresson and Frank Lubischer.

13 MR. BIRMINGHAM: Good morning, Your Honor. John
14 Birmingham appearing as co-counsel on behalf of plaintiff
15 Nexteer and the co-defendant-- counter-defendants.

16 THE COURT: And, sir, you're..., is it "Sah-hu"?

17 MR. SAHU: Yes, Your Honor.

18 THE COURT: You're appearing from what law firm?

19 MR. SAHU: I'm sorry. With Miller, Canfield, with
20 my partner Jerome Watson, Your Honor.

21 THE COURT: Thank you. Ma'am.

22 MS. WALD: Good morning, Your Honor. It's
23 Alexandra Wald from Cohen and Gresser for the defendant Mando
24 America Corporation and with me is my colleague Mark Spatz.

25 MR. SHEA: Good morning, Your Honor. David Shea on

1 behalf of the individual defendants and the counter-
2 plaintiffs.

3 THE COURT: Right.

4 MR. TARRANT: Good morning, Your Honor. Matthew
5 Tarrant from Braun and Kendrick. I'm appearing in place of
6 Mr. Kaltenbach on behalf of the five individual defendants.

7 THE COURT: So welcome to Ms. Wald and Mr. Spatz
8 from New York, I believe.

9 MS. WALD: Thank, Your Honor.

10 THE COURT: We're missing Mr. Baran today then?

11 MR. BARAN: I'm not missing. I just thought you
12 had enough, Your Honor. Andrew Baran.

13 THE COURT: Is that everyone then who is going to
14 appear today? Okay. Thank you. Have a seat.

15 I believe there is two matters up for today, the
16 Motion for Leave to Amend Complaint by Mando Corporation to
17 then compel arbitration. And then Nexteer and Lubischer and,
18 is it Bresson?

19 MR. WATSON: Yes, Your Honor.

20 THE COURT: Which motion to dismiss the
21 counterclaim for defamation and abuse of process. It seems
22 to me logically that we would take the arbitration issue
23 first in the event it takes everything else away from us.
24 Ms. Wald.

25 MOTION FOR LEAVE TO AMEND COMPLAINT

1 MS. WALD: Thank, Your Honor. There are really
2 three points that I wanted to kind of put out to frame this
3 motion that Mando is making to compel arbitration and for
4 leave to amend its answer.

5 The first is that leave to amend is to be granted
6 freely. The second is that both federal policy and Michigan
7 policy strongly, strongly favor arbitration. And the third
8 really relates to the first two, which is that we're here on
9 a business court and I looked at the statute that created
10 this court, and it talked about predictability, consistency,
11 uniformity of decisions. And in fact the statute actually
12 says that one of the particular kinds of disputes that the
13 business court is to hear is disputes over a confidentiality
14 agreement, including the alternative dispute resolution
15 procedures in that agreement. So this is precisely the type
16 of dispute where there is supposed to be uniformity and
17 consistency, and where the parties are supposed to know that
18 when they make a contract, that contract is going to be
19 enforced. And that's all we're here to do is say, "hold
20 Nexteer to the bargain that it made". It proposed to Mando,
21 if we have a dispute about something that's arising from or
22 relating to this non-disclosure agreement let's arbitrate it,
23 that's what we'll do. And what does the contract say? It's
24 not ambiguous at all. It says, "International arbitration is
25 going to be the sole and exclusive means to resolve any

1 dispute, controversy or claim that arises from or relates to
2 the NDA".

3 Now both the Michigan Arbitration Act and the
4 Federal Arbitration Act say, unless there's no enforceable
5 agreement between the parties the court shall order
6 arbitration. There's no dispute here that the parties have
7 an agreement. So the only issue is that Nexteer is
8 purporting to dispute the particular claims here fall within
9 the scope of the clause that we're looking at, this arising
10 from or relating to.

11 We cited both federal and state law interpreting
12 that identical language and saying that claims of tortious
13 interference, misappropriation of trade secret arise from or
14 relate to a contract. And again both state and federal
15 policy say, if you have any dispute about whether something
16 falls in the scope, that doubt is to be resolved in favor of
17 arbitration.

18 We cited *Kauffman versus Chicago Corp*, the
19 corporation, and United States Supreme Court case, *Moses Cone*
20 *versus Mercury Construction*. Now, Nexteer says the only
21 reason that you would arbitrate a claim here is if it
22 requires interpretation of the NDA. It's just not so, Your
23 Honor. It's not what the cases hold. That's not what
24 Nexteer itself did when it had an arbitration with Korea
25 Delphi Automotive Corporation; it went through an arbitration

1 panel. And we attached this as exhibit B in our response or
2 reply memorandum, and pointed out that Nexteer itself said
3 that its tortious interference claims and misappropriation of
4 trade secret claims should be arbitrated. Why? Because the
5 agreement in that case had language that said everything
6 arising from or relating to the contract is arbitrable.

7 We cited four federal cases, *Dobson*, *Rose*, *Toledo*
8 *Technologies* and actually the *United States and Paige case*
9 which says, unless the parties have said were only going to
10 use language of under this agreement and not arising from or
11 relating to this agreement. When the parties say, we'll
12 arbitrate disputes under an agreement they mean the
13 interpretation of an agreement. But when they say, "arising
14 from or relating to" it's much broader.

15 Now, what does Nexteer rely on? They're relying on
16 a case called *Alticor*. And they themselves acknowledge that
17 if the *Alticor* case had an overarching (and that's their
18 word) insurance policy, and then a little rider with an
19 arbitration clause in it. And the court in that case said,
20 look when you say this agreement and you're talking about a
21 little rider, I'm not going to import the arbitration clause
22 to the larger overarching policy that governs all of the
23 parties relationship here. That's not the situation we have.
24 We don't have two rival contracts. We just have the NDA.
25 And in a case called *Nestle Waters*, the 6th Circuit said that

1 the rule in Alticor only applies to the multiple contract
2 scenario you had in that case. It doesn't apply to a single
3 contract scenario like we have here.

4 Nexteer also cited a case called Fazio. Now Fazio
5 is a case I think is extremely supportive of arbitration.
6 It's a case where you have an investment banker who basically
7 steals from his clients. And the court says, okay it's
8 completely not foreseeable that a broker would do that. But
9 you have to ask the question, Why did he have their money in
10 the first place? He had it because of an agreement with an
11 arbitration clause in it. And that means that the tort of
12 taking that money arises from or relates to the contract.

13 The same for the NCR case they cited, which
14 involves taking software out of an ATM. In that case the
15 court said, the software that was taken claims for copyright
16 infringement related to that software arise from or relate to
17 the contract. What didn't arise from or relate to the
18 contract in that case, and it's a good illustrative
19 comparison point, were when that same defendant had actually
20 gone out to the market and bought refurbished ATMs and stolen
21 the--the software that way, because the software didn't come
22 to them under an agreement.

23 Here we have a situation where Nexteer expressly
24 pleaded that the whole reason that Mando knows about these
25 defendants and knows about these purported trade secrets.

1 The whole nexus between Nexteer and Mando is supposedly this
2 NDA and that's what they pleaded. And they can try to
3 backtrack now and say, oh, it's merely background. But it
4 wasn't background when they were talking about tortious
5 interference. It was an element of the claim. And they
6 pleaded a gist, loyal scheme. They pleaded that there was a
7 conspiracy among these defendants together based on the NDA.
8 They pleaded that it was wrongful for Mando to have access
9 via the NDA and then to misappropriate as they've alleged
10 these trade secrets.

11 THE COURT: Does it matter that some of those
12 claims are now dismissed?

13 MS. WALD: It doesn't matter because the claims
14 that survived still implicate the NDA. I mean in
15 particular, the tortious interference claim, the wrongful
16 element according to them is this extra--extra nuance of
17 having had a confidentiality relationship.

18 I think that sort of--your question sort of brings
19 us to the individual defendants and the question of, Well
20 what about them? They're not signatories to the NDA.

21 I just want to go through the allegations. The
22 breach of contract claim against the individual defendants;
23 Nexteer pleaded that Mando and the individual defendants
24 "collaborated to entice the Nexteer employees". Mando used
25 the joint venture relationship to encourage key employees to

1 violate their non-solicitation agreements with Nexteer by
2 recruiting fellow employees. Mando solicited them to (and
3 this is from the oral argument) "in effect", work with Mando
4 in Mando's surreptitious attempt to take Nexteer's
5 information as part of a "elaborate scheme" in which Mando
6 was working with the individual defendants against Nexteer's
7 best interest. Those all go to the breach of contract claim
8 against the individual defendants. The tortious interference
9 I--I think it's pretty clear that Nexteer did link the NDA to
10 tortious interference to those two claims that survived.

11 THE COURT: Let me back up for a second. If the
12 breach of contract claim is the contract between the
13 individual employees and Nexteer.

14 MS. WALD: Correct.

15 THE COURT: I guess I'm struggling to understand
16 their argument notwithstanding. What matters what Mando is
17 doing?

18 MS. WALD: Well what--what the allegation is, is
19 that Mando somehow targeted these employees and then
20 persuaded them, and incentivized them to take that next step
21 of breaching the non-solicit and soliciting another
22 subsequent employee. So that somewhere, basically it is sort
23 of a domino effect, but that Nexteer is the one who prompts
24 it and then there's a succession of breaches of individual
25 employment agreements.

1 But I think it's also important to be clear that
2 the individual claims, the claims against the individual
3 defendants, the argument there is actually not really that
4 Nexteer agreed to arbitrate those claims because it didn't.
5 It agreed to arbitrate the issue. And the cases talk about
6 an estoppel in that context. And it's that Nexteer having
7 agreed that arbitration was the mechanism that it preferred,
8 can't say, wow it's really unfair that we also have to
9 arbitrate against these individual defendants because, and
10 this is the test in the caselaw, it pleaded an intertwined
11 course of conduct. So this is more about judicial economy
12 and the fact that there's an estoppel against Nexteer in the
13 saying, we don't want to arbitrate when it would be more
14 efficient to do so and when we've pleaded an overlapping
15 pattern of facts. But it's not that we're saying that these
16 are signatories to the contract, we're not saying that.

17 THE COURT: Let's stop there for a second.
18 Assuming I'm intrigued by using this arbitration clause in
19 the NDA. I have individual defendants who are not
20 signatories, who were employees of Nexteer, a signatory, in
21 an agreement that talked about confidentiality between the
22 corporations, not between the other corporation's employees.
23 So you have, you have internally Nexteer employees
24 theoretically running amuck. That's quite different than the
25 two corporations saying, don't breach our confidences. Those

1 employees then, it gets complicated because they have now
2 countersued on something that I think we'd all agree is quite
3 distinctly different, defamation and abuse of process, and
4 then have and turn brought in new individual defendants. So
5 when we talk about the possibility of some cases allude of
6 bringing in non-signatories just because it's efficient. At
7 some point doesn't it get so remote that you've got to sever
8 it and say, those things are so distinct they're not even
9 part of the tail of the dog? And if so, where does that line
10 get drawn?

11 MS. WALD: Well, I agree with you that the
12 counterclaim is really discrete. I mean it's discrete under
13 the test of what would be arbitrable. So under the Fazio
14 case that Nexteer cited, really the question is: Are you
15 making reference to the agreement? Now, Nexteer literally,
16 they didn't just make reference, they referenced it, they
17 cited it, they attached it in their complaint. When they
18 were talking about both the individual defendants and Mando
19 the corporation, that's not the case with the counterclaim,
20 I think the counterclaim is all about post-complaint conduct
21 and doesn't need to tie to the arbitration agreement at all.
22 I think you're right, its completely freestanding
23 conceptually different thing.

24 But the rule about arbitrating non-signatories is
25 that when the signatory is relying on the terms of a written

1 agreement in asserting its claims against a non-signatory,
2 that's the--that's the language in our--in our brief on pages
3 13 and 14. The case is *General Power Products Coating or Cut*
4 and the *Grigson* case. That's the point is that Nexteer made
5 reference to the NDA when it accused the individual
6 defendants of breaching their non-solicitation agreements.
7 It said that it--that they did that not just as part of an
8 independent decision, you know today I'd like to go breach my
9 non-solicit. But what they pleaded is that that was done in
10 concert with Mando, at the best of Mando, somehow spurred by
11 Mando.

12 THE COURT: I guess I understood that. I'm still
13 struggling to understand, what do I do with this apparently
14 independent claim, the counterclaim? If I buy into your
15 argument, I then bifurcate this rather large case and have
16 two rather large cases going on. Is that what you're
17 proposing?

18 MS. WALD: I mean I think what you can do is, to me
19 it makes no sense to have the individual claims, the claims
20 against the individual defendants proceed here while the
21 claims against Mando proceed in arbitration. It--it--it is
22 more consistent with the contract to have at least the claims
23 against Mando proceed in arbitration. But you end up, you do
24 end up with duplication of effort, duplication of people
25 having to sit and be in depositions and answer the same

1 questions. I don't see the benefit to anybody of doing that.
2 The question does become the individual counterclaims, and I
3 know that the counterclaim plaintiffs are incredibly devoted,
4 I mean they want to tell their side of the story, they want
5 their day in court and to clear their names, yes.

6 THE COURT: So where do they tell it?

7 MS. WALD: And, you know, I don't see why that
8 claim cannot proceed because part of it does depend on the
9 resolution of the main claim. I mean if you're talking about
10 a claim that has to do with abuse of process, you do have to
11 ask about, Well what is the outcome on the main claim that
12 was the--the claimed abuse of process?

13 THE COURT: So, so are you proposing--

14 MS. WALD: So what do you do?

15 THE COURT: --it goes, it gets sucked into the
16 arbitration like everything else?

17 MS. WALD: I really would defer to Mr. Shea on that
18 about whether that would be his preference. It can go to
19 arbitration voluntarily.

20 THE COURT: So it's depending upon their consent.

21 MS. WALD: For the counterclaim? Yes, Your Honor.

22 THE COURT: Okay.

23 MS. WALD: I mean I can't sit here and tell you
24 that I think that it relates to the contract. It..., yes.

25 THE COURT: I was looking for the outer limits of--

1 of your dragnet clause.

2 MS. WALD: Well, it's different because again you
3 have the estoppel point against Nexteer. I don't think that
4 that point would exist. I mean we're not adverse to the
5 individual defendants. But even if we were I wouldn't be
6 saying that they're estopped because they didn't propose an
7 arbitration clause and signed an arbitration agreement
8 relating, and then plead conduct arising from it.

9 THE COURT: Okay.

10 MS. WALD: Just one last thing on the--on issue of
11 waiver that Nexteer has alleged. The key inquiry there is
12 prejudice. Nexteer literally didn't say anything about
13 prejudice in our opposition to the motion. There hasn't been
14 discovery. There hasn't been identification of trade
15 secrets. Some claims that could not stand because they
16 weren't well pleaded or dismissed. That's all that's
17 happened here. It wasn't inconsistent to have some
18 injunctive proceedings because the arbitration clause
19 expressly condones those. So there is no prejudice here to
20 Nexteer from the perspective of arbitration. Thank you, Your
21 Honor.

22 THE COURT: Thank you.

23 MR. WATSON: Good morning, Your Honor. Again,
24 Jerome Watson appearing on behalf of Nexteer.

25 Mando's motion to amend the answer and compel

1 arbitration should be denied for two clear reasons.

2 First, the non-disclosure agreement arbitration
3 provision does not mandate or even allow the arbitrability of
4 case. And that's as a matter of law.

5 Second, justice does not require this court to use
6 its discretion to grant Mando's motion to amend. If
7 anything, justice requires that that motion to amend be
8 denied.

9 First let's talk about the non-disclosure
10 agreement and its arbitration provision. There could be some
11 confusion as to the purpose of the non-disclosure agreement
12 and the ambit of that agreement. The basic purpose of the
13 non-disclosure agreement was to maintain the confidentiality
14 of documents exchanged between Nexteer and Mando as a result
15 of the collaboration. There was an arbitration clause in the
16 non-disclosure agreement that any disputes regarding this
17 purpose relating to it, arising out of it would be
18 arbitrated. The non-disclosure agreement did not govern the
19 entire relationship between Nexteer and Mando. And in fact
20 the non-disclosure agreement did not even govern the entire
21 collaboration. The non-disclosure agreement is like the tail
22 of the dog, Your Honor.

23 THE COURT: Let me interrupt then for a second.
24 The--the clause begins, As set forth in the memorandum of
25 understanding.... That's the first phrase. What is the

1 memorandum of understanding?

2 MR. WATSON: We tried to find it. The best we can
3 figure out, it doesn't exist.

4 THE COURT: So, the contract the parties signed
5 that that prefaces or conditions the arbitration right by
6 reference to another agreement as set forth in something
7 else.

8 MR. WATSON: Yeah, we haven't--.

9 THE COURT: It doesn't exist.

10 MR. WATSON: Yeah, we definitely checked for it,
11 Judge, and we just could not find it.

12 THE COURT: Ms. Wald--

13 MR. WATSON: We the party who should know whether
14 or not that it exists. We think the Nexteer employee does
15 not believe that it exists.

16 THE COURT: Ms. Wald, are you aware of a memorandum
17 of understanding?

18 MS. WALD: I'm not, Your Honor.

19 THE COURT: So, doesn't that leave us somewhat in a
20 quandary where I have a contract signed by the parties that
21 references a parent document if you will, that lays out the
22 rights and responsibilities of the parties, doesn't exist.

23 MR. WATSON: Well, that's an issue. We think the--

24 THE COURT: So I'm being asked to enforce something
25 that is ambiguous.

1 MR. WATSON: We're asking, Judge, that you enforce
2 just the non-disclosure agreement without reference to this
3 possibly non-existent document. And we think the
4 non-disclosure agreement has to be enforced on its terms.

5 THE COURT: And I'm just trying to understand what
6 those terms are since it incorporates by reference another
7 document.

8 MR. WATSON: We don't think it exists, Judge.

9 THE COURT: So it doesn't provide any--any help in
10 defining the phrase "Any dispute controversy or claim arising
11 out of a relation to this non-disclosure agreement".

12 MR. WATSON: We haven't located that document.

13 THE COURT: Okay. Thank you.

14 MR. WATSON: The non-disclosure agreement as I said
15 does contain an arbitration provision and that provides a
16 pertinent part. And I would like to just read it. Any
17 dispute, controversy or claim arising out of or in relation
18 to this non-disclosure agreement including the validity,
19 invalidity, breach or termination thereof shall be settled by
20 arbitration. The legal issue before court is whether that
21 provision requires or even allows arbitration of this matter.
22 As a matter of law, federal law, federal case law we submit
23 that it does not. Nexteer has not asserted any claim for
24 breach of that non-disclosure agreement.

25 I can remember, I think it was in a status

1 conference over the phone with the Court. Your Honor, you
2 asked me if we asserted a claim under that non-disclosure
3 agreement for violation of that agreement, and I said, we
4 haven't, and we haven't. We haven't said it's been violated.
5 Nexteer's case does not involve the validity, invalidity
6 breach or termination of that non-disclosure agreement.
7 Nexteer's claims do not arise out of the non-disclosure
8 agreement. In fact if the non-disclosure agreement did not
9 exist we could assert the very same claims. There is no
10 non-disclosure agreement language that we need or have to
11 depend upon as we assert our claims.

12 THE COURT: I'm hoping you have your amended
13 complaint with you. You can turn to paragraphs 134 through
14 143 to begin with.

15 MR. WATSON: Its 134 through 43 you said, Judge?

16 THE COURT: Right. I--

17 MR. WATSON: I am prepared to talk about this,
18 Judge.

19 THE COURT: I can recall when I first read the
20 complaint back in November, I wasn't sure on my first reading
21 why we were taking this detour in--in a breach of contract
22 action, misappropriation case through history other than it
23 was for some purpose. Now 6 months later, 7 months later
24 it's being suggested by Mando that your very pleadings, not
25 just your oral argument, but I want to focus on your

1 pleadings seem to be going in feeding their argument that the
2 current cause of action or, at least some part of it, arises
3 out of or is in relation to the non-disclosure agreement.
4 And here in 134 we start a whole chapter in your book of
5 Mando and Nexteer enter into a non-disclosure agreement.

6 And then continuing on in 152 and 156, it talks
7 about Mando was actively and surreptitiously soliciting
8 Nexteer employees during this collaborative period of time.
9 The motion required me to go back and reread some of this and
10 frankly when I first read the motion my initial reaction was
11 it didn't have any merit, with due respect. Because I didn't
12 see how the breach of contract and misappropriation all post
13 termination causes of action could somehow relate back in
14 time to the non-disclosure agreement. But here we have it in
15 your writing, in your pleadings, using it as proof that
16 during that collaborative process the employees and Mando
17 were even then working toward this, this offense if you will.

18 So the question becomes, if we take out all these
19 paragraphs for some reason do your causes of action still
20 stand? Are they necessary? If you pled it then I assume
21 after some diligent inquiry there is some merit to it. And
22 the argument is you can't have it both ways. If you've pled
23 it, aren't I stuck with this and saying it does bear relation
24 because you said it yourself?

25 MR. WATSON: Well there are about four points I

1 need to make to respond, Judge.

2 First, I would like to talk about why we pled it.
3 I think that's relevant. The reason we pled it is twofold.
4 Number one, part of our case does involve the collaboration.
5 And we feel the collaboration that between Nexteer and Mando,
6 on Mando's part wasn't undertaken in good faith. And it in
7 fact could've been a scam or a sham to learn information
8 about Nexteer employees and poach those employees.

9 THE COURT: It--it was taken, undertaken in good
10 faith?

11 MR. WATSON: Was not undertaken in good faith.

12 THE COURT: Okay.

13 MR. WATSON: And the non-disclosure agreement was
14 the only document we located that reference the
15 collaboration. So, by attaching the non-disclosure agreement
16 that helped to establish that there was a collaboration.
17 That was one reason to attach it.

18 A second reason to quote from the non-disclosure
19 agreement is that this is a trade secrets case. And we
20 wanted to make the point that Nexteer and Mando really valued
21 the confidentiality of documents. So, even through we've
22 consistently said we have no claim under the non-disclosure
23 agreement. The non-disclosure agreement really was an
24 agreement talking about confidentiality of documents. And
25 the language we quoted underscores the lengths the parties

1 went to in this agreement that we're not suing under, but in
2 this agreement to maintain the confidentiality of documents.
3 So that was illustrative of that purpose in regard to
4 confidentiality and that's why we cited it.

5 To answer your question: If we take out any
6 reference to the non-disclosure agreement, would we have a
7 claim? We certainly would. We would have exactly the same
8 claims. The breach of contract, the interference with
9 contractual relation, the trade secret violation, none of
10 them depend on the non-disclosure agreement. We don't have
11 to reference the non-disclosure agreement. We don't have to
12 interpret the non-disclosure agreement. Our claims are not
13 dependent upon that non-disclosure agreement.

14 Now the Court makes a very good point. Well, you
15 say they're not dependent upon it. But that non-disclosure
16 agreement contains an arbitration clause that has very broad
17 language. And that language includes the phrase "relate to".
18 So doesn't your claim somehow relate to this non-disclosure
19 agreement? We submit to you, Judge, that as a matter of law,
20 federal case law, it doesn't. And that's why we're--that's
21 where we focused our reply brief because there are three
22 cases which are very relevant to this issue, this whole
23 "relating to" issue.

24 The first is the Alticor case and probably the
25 leading case, Michigan 6th Circuit 2005 case. The issue there

1 was whether Alticor had to pay three \$2 million dollar
2 deductibles because there were three occurrences as the
3 insurance company said. Or did it have to pay one \$2 million
4 dollar deductible because there was only one occurrence as
5 Alticor said. Now, there was an issue as to whether or not
6 that case should be arbitrated. There were two documents
7 that were relevant. The insurance policy define the whole
8 relationship between Alticor and the insurance company. And
9 that insurance policy did not, did not contain an arbitration
10 clause. However, there was a payment agreement signed by
11 both Alticor and the insurance company. And that payment
12 agreement did contain, like the tail of the dog, that payment
13 agreement did contain an arbitration clause. So the issue
14 before the court was, Well does the claim relate to that
15 payment agreement? And both the lower court and the 6th
16 Circuit said the claim in regard to whether \$6 million has to
17 be paid or \$2 million has to be paid does not relate to the
18 payment agreement because that claim can be resolved without
19 resort. Two, the payment agreement contained in the
20 arbitration clause where you look to resolve the claim is the
21 overall contract that defines occurrence. And then the court
22 let it be known what the real rule was. When you do not have
23 to interpret an agreement to reach a decision in regard to
24 the claims asserted that agreement even if it doesn't--even
25 if it contains an arbitration clause does not compel

1 arbitration.

2 We cited another 6th Circuit case on point for this
3 same issue. Opposing counsel cited part of the case; it went
4 both ways on certain things. But the key issue here was the
5 claim in regard to the copyright holder. The court ruled
6 that the copyright holder could maintain a claim without
7 referencing the agreement that contained the arbitration
8 provision. So the claim did not have to be arbitrated.
9 Again, the court rejected the standard, which I think the
10 Mando would like this Court to adopt any matter that touches,
11 or an arbitration agreement that touches upon matters. The
12 court rejected that broad standard and clearly stated the
13 standard to be applied. The court said, if an action can be
14 made without reference to the contract, the action is likely
15 outside the scope of arbitration. The court gave a little
16 more advice because he said, the court said, not only is the
17 action outside the scope of arbitration, the presumption in
18 favor of arbitration probably does not apply and it probably
19 was not the intent of the parties to arbitrate the matter.

20 And then there was a quote at 814 of the case.
21 "The cornerstone of the inquiry is whether we can resolve the
22 instant case without reference to the agreement containing
23 the arbitration clause". That's the issue in regard to
24 "relating to".

25 We submit, Your Honor, every claim Nexteer has

1 asserted can be resolved without reference to that agreement,
2 the non-disclosure agreement and therefore the non-disclosure
3 agreement does not mandate arbitrability.

4 THE COURT: What was the case you were citing from
5 page 814?

6 MR. WATSON: I cited two cases, the *Alticor* case
7 and the *NCR* case. A third case cited the principle, that's
8 *Fazio vs Lehman Brothers*, although that case reached a
9 different result; it cited the same principle.

10 Why this principle is so important, Judge, is it's
11 consistent with the standard of law. Opposing attorneys have
12 cited, I don't know, probably ten times how broadly you
13 should interpret arbitration provisions, and how courts favor
14 arbitration and that. But there is another principle that's
15 just as important. A party should only be compelled to
16 arbitrate a matter it has agreed to arbitrate. Arbitration
17 is a matter of consent. It cannot fairly be said in this
18 case, Judge, that because Nexteer agreed to arbitrate any
19 claim that had anything to do with the exchange of
20 information and breach of confidentiality in regard to the
21 exchange of information and the collaboration, because it
22 agreed to arbitrate that. It did not necessarily agree to
23 arbitrate trade secret claims against Mando or poaching of
24 employees or breach of contract claims or the wealth of other
25 claims that Nexteer has asserted. It didn't agree to any of

1 that.

2 THE COURT: But the only reason Mando has any
3 knowledge of these employees that you claim who have
4 surreptitiously taken is because there was a courtship going
5 on during the collaborative process. They would never have
6 met them. They would never have been introduced. Without
7 that genesis we wouldn't be here today because they wouldn't
8 know about those employees. So although, although your
9 claims may survive without the NDA, it arises out of that
10 collaborative experience doesn't it?

11 MR. WATSON: I think at least in part they do, but
12 there's a difference between a collaboration and the NDA.
13 They're separate things. And the NDA only governed the
14 exchange of confidential information during the
15 collaboration. The NDA did not even cover the whole
16 collaboration. It only covered the exchange of protected,
17 the exchange of information in the collaboration. So the
18 non-disclosure agreement arbitration was limited in scope to
19 covering the exchange of information during the
20 collaboration.

21 THE COURT: Let's say for a moment I agree that
22 Mando is charging down a bridge too far. Why do you fear
23 arbitration? Why not just consent to it now?

24 MR. WATSON: Because it's ridiculous for this case.
25 Let me skip ahead to a final reason the Court should deny the

1 motion to amend. The motion to amend is within the
2 discretion of the court and it's granted when justice so
3 requires. Arbitration typically is supposed to be a
4 proceeding that is quicker, saves the parties money, it's
5 more expeditious the reasons to go to arbitration. Those
6 aren't here at all, Judge. It would be impractical to
7 arbitrate this matter. The seat of the arbitration is
8 apparently in Switzerland. The--

9 THE COURT: But let's--let's say it's agreed to be
10 somewhere else.

11 MR. WATSON: Let's say?

12 THE COURT: Let's say it's agreed to be somewhere
13 else, Detroit Michigan.

14 MR. WATSON: Well it's possible the parties could
15 agree. But, gee, everything is right here right now and
16 we're already started. It seems that this is the most
17 expeditious matter to proceed.

18 THE COURT: I will note for the record again, we
19 have hardly started. We are 6 months, 7 months into a case
20 and we aren't out of the pleading stage yet.

21 MR. WATSON: Well there have been a lot of
22 dispositive motions, the parties are working on discovery
23 and--

24 THE COURT: So my--my point is--

25 MR. WATSON: --a lot of work has been done.

1 THE COURT: My point is which is going to be
2 quicker? If--

3 MR. WATSON: Well--

4 THE COURT: If you're truly interested in a fast
5 resolution like you were back in November when you wanted a
6 TRO, and you wanted the case tried way back then when there
7 had been no discovery and you couldn't prove your trade
8 secrets. If you really want to expedite the procedures let's
9 go to trial or arbitration would be quicker.

10 MR. WATSON: Well, I don't think arbitration would
11 be quicker because number one, this case would have to be
12 dismissed. We would have to set up arbitration. We would
13 have to find three arbitrators and we would have to get
14 started with that. And in most arbitrations nowadays, Judge,
15 discovery takes place, a lot of times arbitrations take
16 longer than court proceedings and there's just as much
17 discovery. So we don't think it would be any quicker. We
18 think we would have to pay three arbitrators to decide the
19 matter; that would be very expensive. And if the parties
20 couldn't reach agreement the thing would be in Switzerland.
21 Plus, there's a potential of bifurcating this thing which
22 doesn't make any sense whatsoever. We don't agree with it.

23 THE COURT: So Mr. Watson if I--if I tell you that
24 today we're going to set this for trial in November, which
25 will be a year anniversary from when it got started, will

1 arbitration be any faster?

2 MR. WATSON: I don't believe it will be faster than
3 that. That's awfully quick, Judge.

4 THE COURT: It's a year after you filed. It's a
5 year after you tried to have a trial on November 5th.

6 MR. WATSON: Well we wanted a TRO back then.

7 THE COURT: Right.

8 MR. WATSON: One further point before I sit down,
9 Your Honor. I skipped ahead to the denying of the motion to
10 amend. The attorneys for Mando, or Mando does rely upon
11 various cases in support of its position. And we spent some
12 time reviewing the cases. In their initial brief on pages 9,
13 10 and a footnote on page 11, they cite a total of seven
14 separate cases supposedly standing for the proposition that
15 courts interpreting language substantially identical to that
16 and the NDA have held at the scope of such a clause is
17 "extremely broad".

18 We looked at those seven cases; five of those seven
19 involve sort of employment matters, agreements between the
20 employer and the employee or the union. And those agreements
21 contain arbitration clauses covering the employment
22 relationship. And when there were disputes under that
23 employment relationship the matters were arbitrated. Those
24 cases don't have anything to do with this, or very little.
25 There's some language you can take from them, but they have

1 very little to do with this. The other two of the seven were
2 construction cases where the owner and the construction
3 company entered into an overall agreement and then there was
4 some dispute in regard to performance and payment. And those
5 construction agreements had an arbitration clause. That's
6 not helpful to this.

7 Then in their reply brief they rely upon the Nestle
8 line of cases. And that gets closer to the point, but those
9 cases support our position, not theirs. In Nestle, the
10 company Nestle bought the water rights from various property
11 owners. And there was a general contract covering the
12 relationship between the property owners and Nestle. And
13 attached to that contract was a deed that Nestle and each
14 individual property owner would have to enter into. Well
15 there was a dispute which had to do with the deed. The deed
16 did not even contain an arbitration provision, but the
17 overall general agreement governing the relationship did. So
18 the court was confronted with the issue of whether or not the
19 matter should be referred to arbitration. The court referred
20 the matter to arbitration and it looked at the overall
21 general contract said that governed the relationship and it
22 contained an arbitration provision. And even though the deed
23 where the specific issue was did not contain an arbitration
24 provision. That deed fell under the overall relationship and
25 thus the matter was arbitrable.

1 In a bad analogy what I like to say is that the
2 arbitration dogs, the whole contract contained an arbitration
3 clause, the arbitration dog is able to wag its tail in that
4 instance.

5 Now, that's what the Mando cites in support of its
6 position. We don't think that's really relevant to this
7 case. Our case is the opposite sort of the Nestle case. In
8 our case you have a limited arbitration or limited agreement,
9 the non-disclosure agreement is limited in what it covers.
10 It's like the tail of the dog. And it contains the
11 arbitration clause. And the tail should not be able to wag
12 the dog if the dispute does not involve the tail. And that's
13 what's going on here. They're trying to use the tail to wag
14 the dog when the real dispute, in fairness, Judge, it doesn't
15 involve that non-disclosure agreement. And the arbitration
16 provision and the non-disclosure agreement should not control
17 this matter and it's not fair either. Because just, because
18 Nexteer agreed to arbitrate issues in regard to the exchange
19 of information and the collaboration it never agreed to
20 arbitrate the issues in this case, the key issues. Thank
21 you, Judge.

22 THE COURT: Mr. Watson, I go back to my question
23 then. If I buy your argument that this doesn't apply.

24 MR. WATSON: Yes.

25 THE COURT: What makes this the better forum to try

1 the case?

2 MR. WATSON: I think it's local. I think this is
3 a case I would like to try before a jury. I believe we've
4 already started in the case; it has been narrowed down
5 through all kinds of motions. And we've been into the thing
6 for 7 months. My experience, the longest matter I ever had
7 was an arbitration matter. My experience with arbitrations
8 haven't been as good. I think..., and I don't want to butter
9 up the judges. I think judges are better decisions makers
10 than arbitrators. I feel better with a jury and arguing my
11 case to a jury than I feel with an arbitrator. Arbitrators
12 are generally attorneys who are making money, and the longer
13 the matter goes the more they make. They tend not to follow
14 the rules of evidence, they short-circuit things. I'm just
15 not a strong proponent of arbitration. Now the courts having
16 said what I believe, but if you ask a lot of practicing
17 attorneys they'll tell you nowadays, Judge, you go to
18 arbitration, you get the same discovery that you would get if
19 you're in court and a lot of times it takes just as long.
20 And the decisions are more inconsistent because judges make
21 better decisions than arbitrators. That's why I don't like
22 it.

23 THE COURT: Ms. Wald, if I can, if you'll tolerate
24 a few questions.

25 MS. WALD: I'm--I'm sorry, from me, Your Honor?

1 THE COURT: If I may, please.

2 MS. WALD: Thank you.

3 THE COURT: The NDA talks about, the arbitration is
4 in accordance with the rules of arbitration of the
5 International Chamber of Commerce. Forgive me, but what's
6 that?

7 MS. WALD: Oh, it's, the ICC is one of the general,
8 it's a very well recognized arbitration body. Mr. Spatz and
9 I have just had an arbitration there I guess last year. It
10 has codified rules. It has home basis in I believe
11 Singapore, Switzerland, I think London and I think you can
12 also do it in New York. And then as, Your Honor, pointed
13 out, Mando is more than willing to agree to the actual
14 conduct of the arbitration proceedings being somewhere other
15 than the home base.

16 To file an ICC proceeding, all that would be
17 required is to file a petition. You send it to a main, what
18 they call the secretariat. The secretariat then asks you who
19 are your nominees for arbitrators, you name the arbitrators;
20 each party names one and then the nominees name a third
21 together and then you're off, you're off to the races.

22 THE COURT: Does it--does it preclude by
23 definition-- is it by definition not a Michigan statutory
24 arbitration?

25 MS. WALD: Its--I--I think I understand what, Your

1 Honor, is asking. And I thought that there--that the
2 interpretation of the most recent arbitration statute said
3 that it doesn't matter whether there's language in the
4 contract talking about a Michigan statutory interpretation or
5 not. But--but, no, it wouldn't be an arbitration that's
6 proceeding as a Michigan statutory arbitration, it's an ICC
7 arbitration.

8 THE COURT: So by on the face of the agreement, the
9 Michigan statute doesn't apply?

10 MS. WALD: No, I don't think that's correct, Your
11 Honor. I think that the agree--the statute applies when the
12 parties have an agreement to arbitrate. And I thought that
13 under the prior version of the statute which was superseded
14 in the July 2013, the requirement that there be language
15 referring to a Michigan statutory arbitration was--was
16 removed. But if you, if, Your Honor, would like us to submit
17 something supplemental on that we could.

18 THE COURT: Well, I was trying to understand part
19 of the argument that we really haven't raised today as
20 whether it's federal or--or state. And I don't know that
21 that really matters if at the threshold I decide it is or it
22 isn't arbitrable.

23 MS. WALD: I don't think it does matter, Your
24 Honor, because I'm not hearing any conflict here and that's
25 when the preemption would kick in. We cited the case to

1 DeCaminada, which is the Court of Appeals where the issue was
2 do you have to arbitrate an employee discrimination claim.
3 And the--the lower court felt that Michigan policy would
4 preclude such an arbitration and the Court of Appeals said
5 you have to yield to the federal statute. We don't have
6 that kind of a conflict here.

7 THE COURT: Okay.

8 MR. WALD: Could I--

9 THE COURT: Do you have further response?

10 MS. WALD: I do, Your Honor. I'm--I'm hearing a
11 lot of kind of different things. It's funny that, Your
12 Honor, just brought up the question sort of local versus
13 international. I mean, Nexteer has said both things, this is
14 an international agreement, but somehow this is a local
15 dispute.

16 I want to be very precise about the non-disclosure
17 agreement. Nexteer keeps saying that the only purpose of
18 this agreement was to govern confidential information and how
19 it would be used between the parties; I think they've said
20 confidential documents. What it says in the non-disclosure
21 agreement is it's to establish and implement a business
22 relationship. Yes, it's true the parties are obligated to
23 use information in certain ways. And I'm reading paragraph 2
24 on page 2 of the NDA. But it also says, partners are further
25 obligated to use all information to which they gains,

1 (there's a typo) access or become aware of on the basis of
2 this agreement exclusively for the agreed purpose.

3 Now, I don't want to talk myself into a breach of
4 this agreement, but it's pretty clear to me that Nexteer is
5 pleading that information that Mando acquired under this NDA
6 was used for some other purpose.

7 This is paragraph 152 of the amended complaint.
8 During the April to August 2013 timeframe while the NDA was
9 in effect and Nexteer and Mando were considering working with
10 each other, Mando was actively and surreptitiously soliciting
11 employees to work for it. Though, the purpose of the
12 potential collaboration was clearly delineated, Mando in
13 violation of the "terms and spirit" of the NDA utilized the
14 potential collaboration to secure information on the key
15 Nexteer employees, operations, product, and technology so it
16 could have obtained the same for its own use.

17 I mean that doesn't sound to me like they're not
18 pleading a breach of the NDA. They are certainly saying that
19 something was done that violated "its terms and spirit". So
20 these claims do relate to the NDA.

21 THE COURT: But that's why I drilled Mr. Watson.
22 But in--in fairness if you--if you take that chapter of the
23 book out as in hindsight surplusage and if it doesn't do any
24 harm to the surviving claims, am I to decide this critical of
25 whether or not this entire thing goes to arbitration based on

1 allegations in a long winded complaint that don't matter?

2 MS. WALD: But how is it surplusage, Your Honor? I
3 mean when it came to the tortious interference and when Mando
4 moved to dismiss that claim..., this is from Nexteer's
5 supplemental brief, here Nexteer allege that the defendants
6 engaged in a variety of duplicitous and unethical conduct.
7 In particular, the complaint details how Mando participated
8 in a premeditated scheme, etcetera, etcetera. And this is--
9 this is Nexteer's words..., The allegations include that:

- 10 • Mando entered the non-disclosure agreement to
11 collaborate as Nexteer's partner in a joint
12 venture.
- 13 • Under that agreement, Mando could not use the
14 information it learned for any purpose other
15 than advancing the two companies joint and trust
16 in that venture.

17 And then it talks about..., it goes on: Prior to and
18 during the agreement Mando got information about the modular
19 power pack. Mando and the individual defendants misused the
20 joint venture and confidentiality agreement in a disloyal
21 scheme. That--and then they said, that is more than enough
22 to circumstantially articulate either the per se wrongful
23 conduct or intentional and malicious conduct that will
24 equally support the essential element of the tort.

25 They're saying without those allegations they don't

1 have the essential element of the tort. So how did they have
2 two tortious interference claims that go forward if they, if
3 this is mere surplusage?

4 THE COURT: Two points. One., Am I wrong to have
5 any reservations in ruling on today's motion based on things
6 that are not the pleadings, not the complaint? When you're
7 bringing in arguments and--and advocacy, am I wrong to not
8 have some reservations relying on that as oppose to just the
9 pleading?

10 MS. WALD: No, Your Honor, because this was a
11 motion to dismiss the pleadings. So this was Nexteer coming
12 back and saying, here's what's in our pleading that states a
13 claim. That's what a motion to dismiss does. It begs the
14 other sides to come forward and say, no, we did adequately
15 plead each element of the claim. And that's what Nexteer's
16 response was, here's how we pled it.

17 They said in their reply on the arbitration, all we
18 did was cite to paragraphs of the complaint. Well that's
19 true; each one of these things I just read cites a paragraph
20 of the complaint. So, that was what they pointed to in their
21 complaint to state the claim. If they don't have that then
22 they failed to state the claim. And respectfully I don't see
23 how those claims can proceed. They--they can't be allowed to
24 procure a denial of a dismissal motion by saying one thing
25 and then come in and say, oh no it's just background, its

1 surplusage, we don't need those claims.

2 THE COURT: Let me ask you the flip side of a
3 question I asked Mr. Watson. And forgive me if its, its..., I'm
4 interrupting your train of thought.

5 MS. WALD: Not at all.

6 THE COURT: Why 7 months into litigation are you
7 advocating going to arbitration, the contract notwithstanding
8 just conceptually? We're at least timewise we're well into a
9 case. If the purpose of arbitration is to achieve reduce
10 cost of litigation. I could be wrong, but I don't sense that
11 Mando with its multiple law firms and \$5 billion dollar a
12 year income is being motivated too much about cost savings.
13 And if we're talking about efficiency and getting to the
14 resolution, if I tell you that trial will start on December
15 9th is--is arbitration going to improve on that?

16 MS. WALD: Well, Your Honor--

17 THE COURT: So why--why--why, and may be this is a
18 strategy thing that I'm not entitled to know, but why
19 arbitration?

20 MS. WALD: Well, it's funny hearing Mr. Watson talk
21 about arbitration. I thought he should really make a mental
22 note to go back and tell his client to stop putting
23 arbitration clauses in their contracts that they proposed to
24 other companies. I mean this is their contract and in the
25 Korea Delphi case it's the identical clause that they invoked

1 in 2013. So I--I'm not, but from--

2 THE COURT: I'm just asking from your perspective
3 as litigator.

4 MS. WALD: Right.

5 THE COURT: What--what is the benefit to have
6 arbitration when I'm hoping to produce something at least as
7 efficient and less costly?

8 MS. WALD: I guess my concern here: First of all I
9 don't think there's any company that's not concerned with
10 costs, Your Honor, and you know costs of legal fees, costs of
11 electronic discovery. I mean Mando doesn't have a lot of
12 litigation. It doesn't have a giant litigation budget. This
13 is of great concern to it, to have been sued like this. Its,
14 you know, it's concerned about reputational harm. The
15 individual defendants are concerned about reputational harm.
16 But then I also think that there's this issue of the
17 predictability and uniformity of the procedures that the
18 parties agreed to. There's a lot of flexibility in
19 arbitration. There's a lot of ability to take into account,
20 the equities.

21 I saw Nexteer's discovery requests; they're asking
22 for things 15 years back. All the documents about lawsuits
23 of any kind against Mando, any topic, it doesn't matter, it
24 doesn't have to relate to trade secrets. They're asking
25 about all kinds of discovery from Korea. And these are as I

1 understand it the narrowed requests. We're going to fight
2 over those requests; it's going to take a long time.

3 THE COURT: Is there no discovery in arbitration?

4 MS. WALD: There is discovery in arbitration, but
5 the onus is much more on the parties to identify what they
6 want to rely on to prove their claim. So each side goes
7 ahead and identifies what it--what it thinks is the most
8 important and then you exchange that. Then the arbitrators
9 rule in a pretty kind of fast and dirty way, on, okay, you
10 can each have discovery. The parties can have depositions.
11 Its--it's not that there's no discovery, but it's not the
12 wide ranging discovery that takes place under a kind of
13 general question of is it, Could it possibly bear on your
14 claim? Could it possibly turn up something that one day
15 might be relevant? And I'm not faulty that discovery
16 process, but it can be very expensive, so that's why the
17 interest for my client.

18 THE COURT: And to date with due respect, no one
19 has filed an objection to any discovery to of give me an
20 opportunity to rule on that and limited discovery if that's
21 going to be a problem. So, again, I'm just trying to--to
22 understand from both sides perspective, what's the impetus to
23 go to something that the contract has been here since 2011,
24 it's now 2014, 7 months into litigation. And all of a sudden
25 a light bulb comes on and says, this is going to be a

1 benefit. I'm just trying to understand why.

2 MS. WALD: I think that--

3 THE COURT: If part of the purpose of business
4 court is to give you my full attention when you need it and
5 to expedite the resolution to make sure that civil cases and
6 in particular business and commercial disputes find a place
7 to land and be tried. And I can do that if not within a year
8 then shortly thereafter. I'm just trying to understand why
9 it becomes something worth fighting over now.

10 MS. WALD: I do think that there was a bit of kind
11 of a flurry in the initial stages of the case. I don't think
12 that it was fully understood what the import of the NDA was
13 to the case. And you know I wasn't here, but I'm--I'm
14 piecing this together, kind of reading the transcripts and
15 looking at things.

16 The initial answer to the amended complaint was
17 filed way back in December. It wasn't until January that
18 there was the oral argument on the motion to dismiss, and you
19 had Nexteer coming in and talking about this scheme in more
20 detail. And then it wasn't until the end of February that
21 they filed the brief I was just reading from. So it's partly
22 that, I think that Mr. Horton and Mr. Baron, you know, they
23 sort of took it face value. There isn't a breach of the NDA
24 pleaded here because that wasn't the direction that Nexteer
25 was arguing in the initial phases of the case. But as

1 tortious inference emerged as one of the few remaining claims
2 and the nexus of that tortious interference, what--what is
3 the tort there as oppose to just hiring your competitor's
4 employee which every company is free to do? I mean they--
5 they did a very effective job of pressing Nexteer on what is
6 the wrongful thing that happened here, and Nexteer came back
7 with the NDA. And that was what was striking and said well
8 if it's about the NDA well then we're--then we're really more
9 in an arbitration world.

10 THE COURT: Well, the same nine causes of action
11 were filed on day one as were then amended. This segues into
12 a discussion I need to have. And, Mr. Barron, I appreciate
13 that you're here today. I think Mr. Horton is here and Mr.
14 Nam; these are participants in the TRO hearing and the case
15 management conference. And I need to ask you for you candor
16 gentlemen.

17 We have had some discussions off the record and
18 I've gone through the transcripts of what's been on the
19 record and don't find, but my memory, sometimes accurate,
20 sometimes not recalls discussions about the non-disclosure
21 agreement and in particular the arbitration clause. And in
22 poor effort to bring comic relief, I think this is the time
23 that I talked to counsel about, there's an arbitration
24 clause, I'd be glad to carry your bags to Switzerland if you
25 need help. We actually talked about this in one of our

1 meetings. Counsel, does anyone else recall that discussion?

2 MR. BARAN: Your Honor, I don't recall any lengthy
3 discussion on the issue. I think somebody said here, I think
4 it was Mr. Watson or maybe you said that there was an answer
5 given to a question stating that they weren't raising a claim
6 under the NDA. I think that that was something that occurred
7 in one of the phone conferences that we had. I-I-- when you
8 said that I remembered that. But I'm-- if you're, I think
9 you're suggesting that there was a longer and more thorough
10 discussion; is that right?

11 THE COURT: It was more in passing. We recognized
12 it was there, alluded to it, had a chuckle about it because
13 it would nice to go from Saginaw to Switzerland, perhaps.
14 Although, Saginaw today is at least the weather outside is
15 nice. So I really had some recollection of no substantive
16 discussion, but at least a recognition that it was there.
17 And it becomes--it becomes important because, again, going
18 back to the very first time I read through the file, I didn't
19 have to find the arbitration clause, somebody had already
20 highlighted it for me.

21 If you go to exhibit E on Nexteer's motion for the
22 temporary restraining order, it's attached. Not only is it
23 attached but it is highlighted and in the margins says,
24 arbitration provision. No one had to raise a red flag to any
25 of us because this is attached and somebody said, Look,

1 arbitration provision. That generated a discussion. That
2 discussion then if it didn't occur at the time of the TRO
3 hearing when we met in the jury chambers--jury room certainly
4 became a point of formal discussion during the case
5 management conference. And I asked counsel, all of which
6 participated on a conference call, we recognized that the NDA
7 exist and has an arbitration provision. Does it apply?
8 Counsel to a person said, no, it doesn't apply. I then
9 crafted the case management order and before signing it
10 circulated it to counsel and asked for input to make sure I
11 hadn't missed anything. With one minor suggested change that
12 I took up everyone was fine with the case management order
13 and everyone had agreed the arbitration provision did not
14 apply. So when I got the motion I'm struggling to understand
15 my personal memory, faulty as it is, may be that didn't
16 happen. But the case management order did happen. And don't
17 I have then a, not just an acquiescence or an implied waiver,
18 but don't I have an affirmative waiver of the arbitration
19 provision, even if it applies? Ms. Wald.

20 MS. WALD: Thank you. Your Honor, you asked me
21 whether you should have qualms about weighing statements made
22 in pleadings that were, you know, crafted at somebody's
23 computer with the benefit of research and time to think about
24 it, whether those should be accorded the same weight as
25 statements in the complaint. I think here you're talking

1 about statements by counsel. And I'm not saying that that,
2 that, you know we can all read, and I assume that people sort
3 of saw the text on the page, but I'm not sure that they
4 understood the meaning of "arising out of or relating to" as
5 being as broad as it was. And clearly there are--there--
6 there is room for debate here among, you know, good lawyers
7 about whether it's the tail wagging the dog or the whether
8 you know this is the dog, and you just have to go take the
9 dog for a walk. But--but that I don't think people
10 understood that the arbitration clause was as far-reaching as
11 my understanding of the law is that this kind of clause is.
12 And so I don't..., certainly there was no intentional waiver.
13 And that's what a waiver is; you have to have a knowing and
14 intention relinquishment of rights. There was not a knowing
15 relinquishment of rights.

16 THE COURT: Ms. Wald, please.

17 MS. WALD: Your Honor, I mean I can't go too much
18 into privilege conversations. But I don't think anybody
19 said, you know, we don't want to arbitrate. That's not the
20 case.

21 THE COURT: I have--I have before me an array, the
22 best attorneys in the State of Michigan and now New York. I-
23 -I would need somebody to find a case that says when an
24 attorney says either we don't have an arbitration agreement
25 or in this case we acknowledge there's an arbitration

1 agreement, but it doesn't apply. Boxes checked. And they
2 ratify it through the lack of objection that that's not a
3 waiver. Now, the question may be, Can they go back and
4 unwaive it somehow? I don't know that. Can you--can you
5 reassert a waived arbitration provision months into a
6 litigation?

7 MS. WALD: Well, Your Honor--

8 THE COURT: But I'm very troubled, and I'm not, I'm
9 not upset with anybody. But I'm just very troubled whether
10 I'm a lawyer or a judge..., if we're going to progress further
11 down this road that after 7 months we're not out of the
12 chute. Some of the foundation stones we lay have to be, have
13 to have some validity.

14 MS. WALD: I agree, Your Honor, and I understand
15 the question. I mean I do think that this claim evolved. I-
16 -I think, and you know, I wasn't here; all I can do is tell
17 you what I read in the oral arguments and in the briefs. And
18 the tortious interference claim shown a light on that NDA
19 that was different and needed. I mean the words that Nexteer
20 used are an essential element of a claim. I just..., perhaps,
21 Your Honor, and you were here, so if you think that was
22 abundantly clear on day one, you know, I'm not sure I can
23 change your mind. But I think that there was more of a
24 dawning realization over time. And--and certainly that's
25 where we are now, I mean you know we were brought in to--to

1 help on the case and said look at us you guys have an
2 arbitration clause.

3 THE COURT: And that's why I searched out too.
4 Okay, let's say we have an arbitration clause, so what. I
5 mean we're still further ahead now than if we, if we start
6 and start a new engine with the--with the arbitrator, aren't
7 we further ahead?

8 MS. WALD: But what is the prejudice to Nexteer,
9 Your Honor? I think that's the legal question.

10 THE COURT: Oh, I--I agree. So Mr.--Mr. Watson,
11 what is the prejudice?

12 MR. WATSON: I think there's some prejudice in
13 regard to waste of time and money, more expensive and that.

14 THE COURT: Why? We haven't done anything yet.
15 Other than argue motions--

16 MR. WATSON: Well--

17 THE COURT: --we haven't done anything yet. You've
18 not--you've not completed your discovery. What--what
19 prejudice could you possibly have?

20 MR. WATSON: I think if we do go to arbitration
21 it's going to be more expensive, it's going to take more
22 time, it's going to be more inconvenient for the parties and
23 witnesses and that's not good. But I really didn't argue,
24 Judge, the prejudice part of it. What I argued was the
25 motion to amend part of it where this Court has discretion to

1 deny a motion to amend and should only grant it where justice
2 so requires.

3 THE COURT: Which his generally liberally
4 construed--

5 MR. WATSON: Yeah.

6 THE COURT: --unless there's--

7 MR. WATSON: It is.

8 THE COURT: --unless there's delay or futility
9 then.

10 MR. WATSON: Yes.

11 THE COURT: So in general they get to amend. We
12 jump to the issues of, is the arbitration clause enforceable?
13 If it's not then it's futile, if it is then we get to go.

14 MR. WATSON: Yeah, well, we've argued, I've argued
15 pretty extensively that it's not enforceable. And I still
16 say, Judge, even though there's some language in briefs which
17 I admit is there, we could in our amended complaint which we
18 worked on and about ready to file, we could take out any
19 reference to the NDA, assert the exact same claims.

20 THE COURT: Well I was going to ask, how much you
21 wanted to be married to your pleadings?

22 MR. WATSON: Well, we are married to our pleadings.
23 Although, I've announced to the Court that we are filing an
24 amended complaint and we'll dig out every reference to the
25 NDA. It doesn't--doesn't matter with our pleadings.

1 THE COURT: And I would like to talk about that
2 too. You've--you've offered in one of the status conferences
3 notwithstanding what I thought was a fairly clear signal that
4 you were going to try to amend your complaint to allege a
5 breach of duty of loyalty.

6 MR. WATSON: Correct.

7 THE COURT: If I understood your argument or if I
8 anticipate your argument, it's a breach of duty of loyalty of
9 the Nexteer employees while they were employed at Nexteer
10 while they were playing footsie with Mando--

11 MR. WATSON: Correct.

12 THE COURT: --during the course of the
13 collaboration agreement?

14 MR. WATSON: During the time period the
15 collaboration was taken--taken place--

16 THE COURT: Right.

17 MR. WATSON: --we think they start playing footsie
18 with Mando before the collaboration even actually got off the
19 ground. So it was not the collaboration that initiated it,
20 it started before that.

21 THE COURT: So having read their pleadings and sat
22 through today's argument, are you seriously considering
23 putting more wind in their sails that your claim relates back
24 in time to the NDA process?

25 MR. WATSON: Yes, we are. But, no, we're not going

1 to talk about the NDA. And the fact of the matter is every
2 attorney who was working on this case, Judge, didn't feel
3 that arbitration provision was controlling. We weren't
4 asserting a claim under the provision. And that's sort of
5 the understanding that we all had as we litigated the case.
6 Mando is entitled to bring it up, but I don't think this
7 Judge has to grant the motion.

8 And one of the reasons we want to keep the case in
9 this forum is judicial supervision. We think a judge can
10 supervise a case where that's going to be happily contested
11 with both sides saying the other is not honest, hiding
12 documents, that type of thing, can supervise that type of a
13 case better than can an arbitrator. And also in regard to
14 injunctive relief, we think a court is a superior forum for
15 injunctive relief than an arbitrator as well.

16 THE COURT: Thank you. Ms. Wald, when I--when I
17 was first considering the motion, it seemed to me that the
18 NDA was a vehicle for consensual voluntary exchange of
19 information. And let's protect that consensual exchange,
20 whereas, the case is about the opposite. It's about the
21 misappropriation, the non-consensual, the involuntary theft
22 of information. So even though it chronologically may cover
23 some of the same ground, conceptually isn't it just
24 distinctly different, voluntary versus involuntary?

25 MS. WALD: Could I respond to that, Your Honor?

1 Actually, I think, Your Honor, is making the exact point that
2 I was trying to make about NCR and Fazio, those two cases.
3 That's the whole point. When you are supposed to be using
4 information a particular way, information that was confided
5 in you pursuant to an express agreement that has an
6 arbitration clause, and the nature of the allegation is that
7 you took either the property or the information and you did
8 something unauthorized with it, that's when claims are
9 arbitrated tort claims.

10 THE COURT: But see you didn't take it, their
11 employees took it.

12 MS. WALD: Well, I think they're saying we took the
13 knowledge that we gained of what they're employees knew.
14 That they're saying we--we, you know, designed this work
15 chart and slotted in all the employees based on., the
16 information under the NDA included information about their
17 employees. Also for the tortious interference, they're
18 alleging that we're going for, excuse me, with business
19 relations, they're alleging that we got customer information
20 that the plan is now to go and use improperly. They're
21 alleging that we got technical information that we would now
22 go use improperly. That's just like the software on the ATM
23 in the NCR case. And I--I wanted to go back to that just
24 because Mr. Watson said that in that case only the copyright
25 claim is arbitrated, nothing else. Well, it's true that the

1 claims of ATMs that were stolen on the open market, those had
2 nothing to do with the agreement, they weren't arbitrated.
3 But this is what the court says about at the end; they say
4 there was a common law unfair competition and claim. They say
5 the language makes clear, the NCR is merely asserting claims
6 arising under its agreement through a common law of Rubric.
7 For instance they allege, they plaintiff alleges that the
8 defendant "disregarded confidentiality provisions in its own
9 agreement with the plaintiff" misappropriated trade secrets
10 and other proprietary information of the plaintiff. These
11 allegations relate directly to the confidentiality provisions
12 and mutual non-disclosure agreement in the 1998 agreement
13 that had the arbitration provision. Their resolution will
14 require a court to examine and interpret the terms of the
15 agreement; we therefore conclude the claim is arbitrable.

16 That's what we have here. Is it wrongful for us to
17 have this information? Is it wrongful for us to hire
18 people? The reason Nexteer is saying is wrongful is, well
19 you were only supposed to be doing one thing with that data
20 and you did something else. I think, Your Honor, asked the
21 exact right question. There's a consensual sharing of
22 information. And when the tort is, you went beyond what you
23 are consensually allowed to do, you're--you're in an
24 arbitration realm. And that's exactly what Nexteer did when
25 it did its arbitration in Singapore with Korea Delphi, that's

1 what they said. They told the arbitration panel that, you
2 know, why is this arbitrable? This is--this is Nexteer.

3 More specifically the arbitration clause states
4 that any dispute arising out of or in connection with the
5 agreement shall be referred to arbitration. And then the
6 claims were, it says, in addition to breaching the agreement
7 respondents conduct has violated state and common laws
8 including trade secret misappropriation, tortious
9 interference with business relationships and perspective
10 business advantage and constitutes unjust enrichment.

11 Again, it's an issue of we're going to give you our
12 data, you're going to go get--you're going to go make..., it
13 says, the parties have been corroborating to manufacture
14 automotive drive line systems and components. Pursuant to
15 the agreement responded agreed to use claimants confidential
16 information solely and exclusively for products under the
17 agreement. And then they used it a different way and Nexteer
18 said you have to arbitrate all the related tort claims that
19 come from the improper use that Nexteer alleged.

20 THE COURT: The people who are improperly using it
21 are Nexteer's employees.

22 MS. WALD: In, well in--in the case I was just
23 talking about are here that the allegations of the people....
24 Well as I understand it they're saying Mando is also using it
25 in an unauthorized manner.

1 THE COURT: After the fact.

2 MS. WALD: Also, Your Honor, that reminded me, Your
3 Honor, said that the agreement had terminated the NDA. The
4 NDA actually expires 5 years after.

5 THE COURT: Right. And the confidentiality is
6 indefinite.

7 MS. WALD: Right.

8 THE COURT: The relationship, the collaboration
9 ended.

10 MS. WALD: Correct. Yes.

11 THE COURT: It's 12 O'clock noon, we're going to
12 take a break. I very very much want to hear from Mr. Shea
13 and Mr. Tarrant on the individual employees. I understand
14 that you're not signatories, but because there's a proposal
15 to capture you I'm curious to see what your position is going
16 to be. We'll start again precisely at 1. Thank you.

17 (At 11:59 a.m., court in recess)

18 (At 1:08 p.m., court reconvened)

19 THE COURT: Good afternoon.

20 MR. WATSON: Good afternoon.

21 THE COURT: I trust lunch was enjoyable somewhere.
22 Mr. Shea, I indicated I was interested in hearing from you.
23 If you're ready.

24 MR. SHEA: Good afternoon, Your Honor. David
25 Shea on behalf of the individual defendants. The Court will

1 note that we did not file a response in this case. And we
2 are kind of taking the role of Switzerland in our neutrality
3 on the motion.

4 THE COURT: But I trust I don't put you in an
5 awkward position because you weren't really directly involved
6 in it, and you didn't brief, and I was aware of that. But for
7 reasons that if aren't apparent, I am very interested in what
8 your clients think because it could directly affect them
9 particularly as we go to the counterclaim.

10 MR. SHEA: Yeah, here's--here's--here's our strong
11 position. We want a forum to litigate this case. And if the
12 Court decides that that this case is going to Switzerland
13 then we would consent to arbitrate all of our claims there.
14 If the Court obviously denies arbitration then we would
15 obviously litigate our claims here. What I worry about is
16 the--is the in-between, which is I'm going to send Mando off
17 to arbitration with Nexteer. I'm not going to send the
18 individual claimants, the individual defendants and the
19 counter plaintiffs. And I'm going to have them sit here and
20 stay their claims and not participate in that that
21 litigation, lose all control over the case. Things may be
22 decided in that arbitration which ultimately are, decide
23 their fates and they don't have a say in it.

24 We want to get on with it and whatever forum it is.
25 We are ready to, we are most concern about counterclaim of

1 getting on with our defamation and our abuse of process claim
2 and wherever that may be. So we absolutely do not want our
3 case stayed pending the outcome of some dispute between Mando
4 and Nexteer over some NDA issue. So that's, that is as
5 simply as I can put it, Judge.

6 THE COURT: I appreciate it.

7 MR. SHEA: Okay.

8 THE COURT: And it reprises a theme in a discussion
9 I had with Ms. Wald is to, if we separate it out and I have
10 two claims going, that--that seems to be contrary to the
11 philosophy of trying to bring judicial efficiency to
12 resolving a claim now between multiple parties, disparate
13 claims to say the least.

14 Ms. Wald, did I understand you to say that if the
15 Court orders us to go to arbitration that I'm not bound by
16 the Geneva, Switzerland forum?

17 MS. WALD: Yes, Your Honor, the petition needs to
18 be filed in--in Geneva to commence the proceeding. But the
19 actual hearings can take place here. The arbitration tried,
20 you know can be seated literally down the street. It can be
21 anywhere they parties agree.

22 THE COURT: Even the agreement says the place of
23 arbitration is..., not just the place of filing?

24 MS. WALD: Right. But the rules actually specifies
25 that that, all that means is you have to file there. It's

1 the--it's the seat for the arbitration. But then the, the
2 hearings can be elsewhere.

3 THE COURT: And who determines where it is?

4 MS. WALD: It's supposed to be by agreement of the
5 parties. If the parties can't agree then the default is
6 Switzerland.

7 THE COURT: Mr. Shea, back to you. I can't imagine
8 in your individual defendants' situation that they would want
9 to default to Geneva, Switzerland.

10 MR. SHEA: Yeah. But--

11 THE COURT: So until--

12 MR. SHEA: But we--we did not file an opposition
13 because we were--we were willing to defer to the court, and
14 defer to these two parties who are arguing. We understand
15 that we are employees of--of Mando and we frankly didn't want
16 to stand in their way of--of whatever it is that they want to
17 do. But I will say, that--that, and I just reiterate, we
18 don't want this case stayed for us. We don't want to sit
19 out, sit on the sidelines which have been, has been suggested
20 is, you know a statutorily I wouldn't say required, but may
21 be suggested that the court could do that. We don't think
22 that would be just. So if--so we--if the court believes that
23 we are not parties to that NDA and that it does have to
24 bifurcate then we'll stay here. But we just don't want to
25 have our case delayed in any way.

1 THE COURT: So maybe I misunderstood. If the court
2 concludes that 90 percent of this goes to arbitration but the
3 counterclaim stays here, we would litigate in two forums and
4 you're okay with that?

5 MR. SHEA: Absolutely okay with that.

6 THE COURT: And you're still going to have to
7 litigate wherever on the arbitration.

8 MR. SHEA: As long as we have a place to go.

9 THE COURT: What are the chances, Ms. Wald, Mr.
10 Watson, the two of you being so agreeable today that you
11 would find a place to arbitrate together?

12 MS. WALD: Your Honor, I don't, it's not our intent
13 to make it more difficult. I mean obviously the discovery
14 materials are here. If someone who is being deposed it makes
15 sense for them to be deposed here. I mean we're talking
16 about the actual conduct of a hearing. You know I know that
17 Mando is not interested in increasing the expense and
18 difficulty by--by forcing people to travel. So our bias
19 would be to try to negotiate something closer at least to
20 home. But so I guess I have to leave it up to Nexteer. But
21 I don't think that we are disposed to quibble over, you know
22 you say--you say Detroit, we say Saginaw or something like
23 that. I mean if--if it's that kind of a level I assume we
24 would work to compromise. I mean we have individual
25 defendants who are the employees and Mando is insensitive to

1 the fact that they, you know this is their home turf and
2 where they live and they don't want to be dragged all over
3 the place either.

4 THE COURT: And I go to confess. I don't know that
5 this is--this is an appropriate legal analysis, but it would
6 give me some comfort. It would make me less uncomfortable to
7 order to arbitration if I knew that there was some
8 convenience in the forum, somewhere in the lower peninsula of
9 Michigan whether it's Saginaw or Detroit. Because that's --
10 that's where this cause of action has its nexus. But if the
11 two of you can't consent, and it defaults to Geneva then
12 maybe I don't find the arbitration clause that enforceable.

13 MS. WALD: As I said we are willing to be very
14 flexible. And certainly if that were a condition of
15 arbitration, I-I haven't heard at all from Mando that that
16 would be an issue. And I--I certainly can check with the
17 client, but I don't think it is.

18 THE COURT: Because that way I can have..., I'm not
19 saying this is where I'm going. But if I have to split it I
20 can have a parallel universe going on with a counterclaim
21 here and they're just proceeding in sync together in a local
22 forum.

23 MS. WALD: I understand, Your Honor. Thank you.

24 THE COURT: Mr. Tarrant, you've been rather silent
25 today. Let me give you an opportunity.

1 MR. TARRANT: I'm going to be very very brief, Your
2 Honor, and just say that I rely on the statements of Mr.
3 Shea.

4 THE COURT: Any--any last comments then, Mr.
5 Watson?

6 MR. WATSON: Your Honor, as to the issue of the
7 place of the arbitration. And obviously we don't think the
8 matter should be arbitrated at all. Two points; if it is
9 arbitrated we would want it here in Michigan for sure. We
10 think that bifurcating can create some problems and maybe
11 even inconsistent decisions. Defamation is a defense to a
12 counterclaim and if we were deciding one thing on the lawsuit
13 and one thing in arbitration we don't think that necessarily
14 would lead to a good result, there could be problems there.

15 THE COURT: I--I didn't follow that. Defamation is
16 a defense to the counterclaim?

17 MR. WATSON: Defamation, I'm sorry, I misspoke.
18 Defamation is or truth is a defense in a defamation in the--

19 THE COURT: Yeah.

20 MR. WATSON: --to the defamation counterclaim. And
21 if we're arguing truth as a defense there and then something
22 else is being established in court, there could be a little
23 bit of confusion. With that, we just think that litigating
24 two matters that arise from the similar set of circumstances
25 and different forums could cause potential problems.

1 THE COURT: Let me just walk through that then. I
2 just caught on. This is something you're all aware of
3 perhaps. As you're proving up your claim of misappropriation
4 and proving that in fact they stole something, and if I'm
5 having a defamation claim here, and you're litigating that
6 very issue because you either did or didn't steal, not only
7 you're having to prove it or disprove it twice, but we could
8 come to opposite conclusions.

9 MR. WATSON: Correct.

10 THE COURT: So then how do I sever off Mr. Shea
11 when we all agree that at least as a counterclaim it has no
12 business in arbitration.

13 MR. WATSON: I think arbitration doesn't fit this
14 case very well. And as I argued at length and won't burden
15 the court with it, it's sort of like the arbitration
16 provision in that NDA is the tail wagging the dog. There is
17 perhaps some unfortunate language in some of our pleadings.
18 But the bottom line and all the attorneys for at least the
19 first 6 months of this matter didn't feel that this case
20 would go to arbitration or should go to arbitration or there
21 was any claim in arbitration and that's how the case was
22 handled. That's all I have to say, Judge.

23 THE COURT: Ms. Wald, if I--if I keep the case, you
24 will be disappointed because you didn't get your motion
25 granted. On the other hand you have a forum to resolve your

1 dispute. Is it that major of an issue where it's actually
2 resolved? I mean what I..., let me be candid. If I--if I
3 commit a reversible error and have a trial in December only
4 to find out that we all wasted a year and a half, 13 months
5 of our lives because an appellate court then throws it out
6 because I didn't grant arbitration. That doesn't seem to be,
7 you know good result. So I'm not sure how to ask the
8 question. Again, if you--if you don't win you don't lose
9 because you still have a forum.

10 MS. WALD: I guess what my concern is, Your Honor,
11 is how--how is that following the policy in favor of
12 arbitration. It--it's not at all that I don't believe that
13 that trial court is a good forum to resolve disputes, I do.
14 And that's where the great bulk of where I spend my time is.
15 But there's a policy here and there's a clause here that was
16 proposed by the party that's resisting arbitration. So you
17 know for me when you say I would be unhappy to have lost the
18 motion, you know of course every lawyer would like to win
19 their motions. But I also feel like there are--there's
20 actually kind of you know a weight of authority on one side
21 that's pushing for an outcome that's--that's sort of not
22 getting--(unintelligible)--because of a question about sort
23 of what whether one forum is good, as be the other. And I
24 feel like the legislature already kind of made that decision
25 for us and said no one is forcing parties to have an

1 arbitration clause in their agreements, but if they choose to
2 then the court will carry out its function by enforcing it.

3 THE COURT: So we all want to--we all want to honor
4 the contract. Mr. Watson wants to honor the same contract.

5 MS. WALD: But Mr. Watson is suing in, I believe on
6 that same contract. And so to me it's a little unfair to it
7 both ways.

8 In terms of the practical aspects here though, Your
9 Honor, I guess I'm a little confused on the counterclaim in
10 the sense of, you said if I rule on the counterclaim. But I
11 think no matter what either a jury has to make a decision or
12 an arbitration panel has to make a decision to determine
13 whether there was a meritorious complaint for an abuse of
14 process claim. I think somebody is going to have to have
15 reached the ultimate merit. That's not true necessarily for
16 the defamation claim. But I think there is some aspect of
17 the counterclaim that may be can't proceed exactly in tandem
18 because you need some kind of a resolution of the main
19 overarching initial complaint. Not that--not that the
20 counterclaim should be stayed, but you may--you may need a
21 findings so that the findings on the counterclaim could be
22 predicated on the finding in the main action. But I think
23 Mr. Shea will probably want to speak to that in his, on the
24 motion to dismiss.

25 THE COURT: We'll get to that later. Well I have...

1 perhaps because you were all so good, you make this
2 difficult. I, I have some reservations, I am--I am inclined
3 to find that what happened during that collaborative process
4 was the genesis of a later dispute at least as alleged by the
5 plaintiff. You didn't allege it, I didn't allege, but it--
6 it's there and I'm told there's more coming, all coming out
7 of that, that relationship. Whether or not it is directly
8 involved with the NDA, I'm not sure as controlling as some
9 might want if it's arising out of a related, and given the
10 breadth of policy favoring arbitration I can see starting to
11 embrace part of that. I become less inclined as we move down
12 the road. And then if I have one claim that cannot go into
13 arbitration it is wholly contrary to the very policy we're
14 all trying to adhere to, to split it out into two different
15 proceedings which is I--I guess come to realize late in the
16 process is impossible because as they prove the mis--
17 misappropriation they're proving a defense to the defamation.
18 And whoever wins on the issue of, Did somebody steal
19 something? either gets a big win or a big counterclaim loss.
20 Its--it's going to be pivotal.

21 So I'm struggling in how to go beyond the two
22 parties, Mando and Nexteer and start embracing more people
23 that had no knowledge that they were going to be part of an
24 arbitration proceeding.

25 MS. WALD: But isn't it, I think on the, excuse on

1 the counterclaim I think you have this issue where there's
2 kind of a temporal, it has to be staggered a bit anyhow as to
3 what you've just said as one side is trying to prove
4 misappropriation, a failure to do so would support the
5 counterclaim. But you won't know that for a long period of
6 time because that, even if you based on the schedule, Your
7 Honor, was talking about before, you've got a year before you
8 know whether the--the complaint was good or bad you know to
9 just put it in broad terms. So, but that's not true for the
10 comments in the counterclaim that don't relate to the
11 complaint. I mean there are--there are statements alleged in
12 the counterclaim as being defamatory that don't have anything
13 to do with the complaint.

14 So, you know, again I don't want to--to sort of
15 step on the toes of Mr. Shea, but I think that there's, I
16 don't see how on day one of the counterclaim, you know for
17 example there could be a summary judgment motion that the
18 complaint was frivolous. How--how could you do that? You
19 can't. You've got to wait for some proof in the other action
20 and that could be a decision that's rendered in arbitration
21 that says Nexteer is successful or not.

22 THE COURT: I--I'm missing the point. The
23 defamation would be in lockstep in line with the--with the
24 trade secret claim. The abuse of process I suspect we'll
25 take care of shortly. And so that's not baggage I'm

1 concerned about.

2 MS. WALD: Well I, you know, again Mr. Shea may
3 feel differently whether they're one in the same. But I
4 think if they are one in the same you, you again you can't
5 decide them on day one. You have to, as you said..., Your
6 Honor, said, you have to wait for some proving up of the
7 claim before you know the outcome.

8 THE COURT: But it's part of the same litigation.

9 MS. WALD: It doesn't have to be as part of the
10 same litigation because you could have basically the, an
11 issue preclusion from an arbitration as to that issue.

12 THE COURT: I--

13 MR. WATSON: If I could say something, Judge.
14 Assuming that an arbitration would be done before the lawsuit
15 would be done is an assumption that I wouldn't make in this
16 matter at all. Arbitration is likely to take longer than
17 the, deciding the suit than this court would take and that's
18 been my experience.

19 Two little points I wanted to mention since Ms.
20 Wald mentioned counterpoints. She talks about this strong
21 policy favoring arbitration. And that's true and it's in
22 every case that we've cited. But there's an equally strong
23 policy that a party shouldn't be forced to arbitrate a claim
24 it never agreed to arbitrate or never wanted, or never
25 intended to arbitrate. We never wanted, agreed, or intended

1 to arbitrate any trade secret claim or any interference with
2 contract claims or any of the claims we've asserted in this
3 case. We never agreed to that. Never wanted. Never
4 intended to agree to any of that. And the test, again, I do
5 reiterate this Court can apply to reach that decision, is
6 look at that non-disclosure agreement and if that
7 non-disclosure agreement does not have to be interpreted to
8 decide our claims, we are not bound to arbitrate under that
9 non-disclosure agreement. There are three cases that clearly
10 say that, Judge, and as a matter of law we're right on that
11 issue I submit to the Court. And the Court mentioned a
12 concerned about being reversed, but that goes two ways. We
13 think we have a great legal argument and we're right on the
14 law.

15 Another thing that keeps getting mentioned is the
16 arbitration clause and the breadth of that arbitration
17 clause, that's important. But a study of the cases reveal
18 that's what's most important is the breadth of the agreement
19 containing the arbitration clause. Not the clause, the
20 agreement containing the clause. And the breadth of that
21 agreement, the non-disclosure agreement here is quite
22 limited.

23 I also want to mention that Mando met and courted
24 the key individuals in this case, the Ross brothers before
25 the collaboration even started. So that's a portion of our

1 case. Our case is not totally dependent and doesn't start
2 with the collaboration. And I would also point out; the
3 collaboration is different from the non-disclosure agreement.
4 We can assert a claim based on the collaboration without ever
5 mentioning the non-disclosure agreement. Thank you.

6 THE COURT: And then I'll continue my analysis. I
7 have these reservations and whether I decide for or against
8 arbitration, it, I still have this concern that if it gets
9 thrown out that it's inconceivable that we would start over
10 in, in other forum that an appellate court says I should've
11 gone to in the meantime. I just, I can't imagine that being
12 the process.

13 But in any event, in this case where I have the
14 affirmative acknowledgement that the arbitration clause does
15 not apply is not insignificant to me. And I don't know that
16 prejudice would matter in that case, the fact that you could
17 restart into arbitration without too much difficulty. I'm
18 not sure that would be controlling because that's not the
19 type of waiver where is occasion just by delay. When you
20 have an affirmative act of somebody saying, I agree I
21 stipulate that the arbitration agreement does not apply here.
22 And--and that's what we have,--

23 MS. WALD: Your Honor, could I---

24 THE COURT: As I recall, I don't have it in front
25 of me, but paragraph 17 has two boxes checked. Yes, there's

1 an arbitration agreement. So no one got blindsided. But we
2 agree that that does not apply. Is not applicable is the
3 phrase. Wouldn't--wouldn't the court or any party have the
4 right to rely upon that with or without prejudice? That's
5 that's with all due respect to your comment to the contrary
6 that's a knowing waiver. No one had to mirandize anybody
7 because it was the lawyers who were doing it.

8 MS. WALD: Your Honor, could I just point something
9 out? That the date on the document that you're talking about
10 is December 2nd; the complaint was actually not amended until
11 after that. So that--that case management order, it
12 pertained to a complaint that isn't even the complaint that's
13 in effect now in the case.

14 Also there was a box that said "waived" for
15 arbitration. Arbitration is waived. That boxed is not
16 checked. Says, is not applicable. And that's, that was the
17 understanding at the time. And then on the next page it
18 says, this case is not presently being submitted to any form
19 of ADR but maybe subsequently.

20 I--I don't think that a case management order is
21 intended to create waivers. I think--I think it represents
22 the parties best efforts to talk about the logistics of the
23 case at the time with the court and facilitate things. I--
24 I'm not saying that everybody shouldn't be as forthcoming
25 and--and try to live up to the words that they're saying.

1 But I also think things happen in the case subsequently. And
2 --and I'm not sure its right to hold parties to a case
3 management order.

4 MR. WATSON: I--

5 THE COURT: I appreciate that. And--and we don't
6 want to hold the plaintiff to their pleadings either.
7 Everyone--

8 MR. WATSON: I--

9 THE COURT: Please. We're all--we're all looking
10 for some cover here. And, you're right, the case management
11 order I think is a, I don't want to call it a living
12 document, but it is not necessarily in stone. And I've
13 invited counsel that as things progress things can change.
14 But it didn't change on the next day or the next week or the
15 next month. We're months pass what we all thought we had
16 agreed to. And if for nothing else the Court feels
17 prejudice. I relied upon this case going forward as a
18 business court case here. So that issue I would like to see
19 briefed.

20 MS. WALD: Yes, Your Honor.

21 THE COURT: Can you retract what may or may not be
22 a waiver? I don't want to hold you to that standard. And
23 unfortunately when we look back in 20/20 hindsight using a
24 template with boxes and we check a box. I can't recall if I
25 recreated a box for this that wasn't there before and say, is

1 not applicable, because the waiver is there and wasn't used.
2 But it's not something that--that we've, I don't think the
3 parties have addressed.

4 MS. WALD: Yes, Your Honor.

5 THE COURT: So I think I'll leave it there is that
6 it falls back in your court. This is a hurdle somebody has
7 to get over if we're going to go to arbitration. Because I
8 don't think we should just lightly dismiss what people
9 stipulate to.

10 MS. WALD: Yes, Your Honor. Thank you.

11 THE COURT: When.... Ms. Wald, it's your motion.
12 When could I see some further argument?

13 MS. WALD: Would a week be sufficient, Your Honor?

14 THE COURT: I will be gone for a couple weeks, so
15 I'm glad to give you some more time.

16 MS. WALD: Oh, okay. Then could we take three
17 weeks; is that okay?

18 THE COURT: That's fine.

19 MS. WALD: Thank you.

20 THE COURT: Mr. Watson, you know what the issue is.
21 You can brief during the same time period. I suspect we're
22 going to have responsive briefs and replies to that too.
23 Somewhere on my desk I'll find room.

24 MR. WATSON: Thank you, Judge.

25 THE COURT: If we could move on into the motion to

1 dismiss the counterclaim.

2 MOTION TO DISMISS COUNTERCLAIM

3 MR. WATSON: Good afternoon, Your Honor. Jerome
4 Watson appearing on behalf of counter defendants Nexteer,
5 President Bresson, and Director of Engineering Lubischer.
6 Before the Court is Nexteer's Motion to Dismiss the
7 Defamation and Abuse of Process Claims of the counter-
8 plaintiffs for failing to state a claim.

9 As to defamation I would first like to dismiss
10 briefly the factual content--context with which counter-
11 defendants were faced. Five key high level engineering
12 managers left the company on September 4 and September 5,
13 2013. They left in a 36 hour period to work for a
14 competitor. They didn't give any notice. They didn't even
15 tell their managers they were leaving. By their own
16 statement--their own statements they were all long-term key
17 Nexteer employees. And I want to a moment, Judge, to let you
18 know what they said about themselves.

19 Counter-plaintiff Christian Ross said he started
20 Nexteer in 1991 and that "rose through the ranks to become
21 Nexteer's future engineering manager where he was responsible
22 for leading and driving technology within the future
23 engineering department, which was comprised of approximately
24 30 engineers."

25 Kevin Ross through the complaint paragraph 31

1 stated that he'd been with Nexteer since 1994. "Over the
2 next 18 years, Kevin rose through the ranks to become
3 Nexteer's director of steering business line. And by
4 September of 2013 vice-president of steering business line."

5 Tomy Sebastian started at Nexteer in 1992. In
6 paragraph 33 of his, of the counter complaint in regard to
7 him it stated, "Over the next 21 years Sebastian rose through
8 the ranks to become Nexteer's chief scientist, leading and
9 coordinating the future engineering electromagnetics and
10 electric hardware group."

11 Counter-plaintiff Ted Seeger in paragraph 35 of his
12 complaint stated that he started in at Nexteer in 1998.
13 "Over the next 16 years Seeger rose through the ranks to
14 become chief engineer for electric steering in 2000. And
15 ultimately Nexteer's executive director of manufacturing
16 strategy for EPS product line."

17 And finally counter-plaintiff Tony Dodak stated
18 that he started at Nexteer in 1994. In paragraph 37 it
19 stated, "Over the next 18 years Dodak rose through the ranks
20 to become Nexteer's chief engineer of EPS core engineering."

21 Thus, we submit that they were all key high ranking
22 managing engineers at Nexteer. Thus, Lubischer, Bresson and
23 Nexteer were called upon to address a very negative situation
24 where key employees left the company over a short period of
25 time, 36 hours to immediately start work for a competitor.

1 This is the context in when they're--in which their
2 defamation claims much be evaluated. We submit that this
3 factual context leads to two obvious conclusions. And both
4 those conclusions support the granting of Nexteer's motion to
5 dismiss the defamation claims.

6 First, virtually every employee, and there are I
7 think thousands of them, at Nexteer's facility would've heard
8 about the departures and would likely offer their comments,
9 statements and opinions regarding the departures. This is
10 human nature. This is going to be the talk of the plant.

11 In regard to this point, Judge, the unprofessional,
12 really harmful manner in which counter dependents--counter-
13 plaintiffs quick their positions would naturally cause people
14 to criticize what they did. Again, that's human nature. You
15 got the remaining employees looking at these five key
16 employees who were very important to the company's future,
17 all of a sudden left the company, they're going to be
18 criticized by quite a few people. What counter-plaintiffs
19 attempt to do is compile various of these criticisms comments
20 and opinions by company employees and label them as
21 constituting defamation. As we have argued in our brief
22 these criticisms and opinions do not constitute defamation
23 for several reasons. And there are different reasons for
24 different statements.

25 First, most of them lack the specificity required

1 to support a defamation claim. And I'm not going to dwell on
2 the law in regard to these points, Judge, it's in our brief.
3 And I know you really read the briefs.

4 Secondly, many of them under the circumstances,
5 many of these common statements opinions constitute what the
6 courts have referred to as "rhetorical hyperbole" or
7 "vigorous epithet". The courts have recognized that in
8 situations employees are going to talk and they're going to
9 make comments and they're going to say things. And those
10 comments typically are not actionable.

11 Third, most were made by the individual counter--
12 most were not made by the individual counter defendants. And
13 Nexteer should not be held responsible for comments made by
14 employees who did not have as part of their job duty the
15 obligation to make comments. They have a First Amendment
16 Right to criticize the counter-plaintiffs if they wanted to
17 criticize them. They haven't been sued in this case and
18 Nexteer should not be held responsible for their comments.

19 Fourth point is the counter-plaintiffs left in a
20 manner that seemed calculated, really calculated to inflict
21 harm on Nexteer. Statements criticizing them were
22 inevitable. In by and large those statements simply do not
23 constitute defamation.

24 THE COURT: Mr.--Mr. Watson, could I ask, you made
25 initially and said that, a comment that the alleged defending

1 statements were not specifically pled. Can you give me an
2 example?

3 MR. WATSON: Well, I can think in regard to
4 Bresson, they said, on information and belief we believe
5 Bresson agreed with or endorse various statements that were
6 made.

7 THE COURT: Knew about and authorized?

8 MR. WATSON: Yeah, something like that. For
9 defamation typically you have to state exactly what was said,
10 who heard it, where it was said. That type of thing.

11 THE COURT: I understand. But your argument was
12 that the--that the defamatory statements were not
13 specifically pled. And that I hadn't captured from your
14 prior written argument. I understood that you, you
15 complained that certain of the elements of defamation were
16 not specifically pled but not the defamatory statement
17 itself. So I was--I was curious what you meant.

18 MR. WATSON: Okay. Primarily what we had in our
19 written statement, the first prima facie element of a
20 defamation claim is the making of a defamatory statement.

21 THE COURT: Right.

22 MR. WATSON: And that statement has to be made.

23 THE COURT: Okay.

24 MR. WATSON: Or and making and claiming a statement
25 constitutes defamation, the plaintiff has to state exactly

1 what was said, who it was said to, when it was said and that
2 kind--type of thing, that's prima facie element number one.

3 THE COURT: I understand. I was just trying to
4 make sense of your argument that the defamatory statements
5 weren't defamatory or because they weren't specifically pled.
6 And I'm trying to find out if that's really what you meant to
7 say or if you concede that the statements are at least pled
8 regardless of who they're attributable to.

9 MR. WATSON: Okay. I understand, Judge. I think
10 what I'm saying is they did plead a lot of statements. And
11 some of the statements did specify who made them and who was
12 there and so forth. Other statements that were pled in the
13 complaint did not specify when the statement was made or who
14 heard the statement. As to those statements that lack--that
15 level of specificity, what we're saying is they cannot
16 support a defamation claim because they lack the required
17 level of specificity. Now some of the statements made do
18 have that level of specificity but they cannot support a
19 defamation claim we submit for other reasons, such as there
20 was a privilege or qualified privilege. So different points
21 I'm making support dismissal based on different grounds.

22 THE COURT: You're--

23 MR. WATSON: I'm not sure that answers your
24 question though, Judge.

25 THE COURT: No, that part I fully understand. You

1 made a comment as part of this discussion I want to go back
2 to since you raised it. It's alleged that Mr. Lubischer and
3 Mr. Bresson at least on occasion knew about and authorized
4 statements by subordination.

5 MR. WATSON: Yes.

6 THE COURT: That they didn't make the statements
7 themselves.

8 MR. WATSON: Yes.

9 THE COURT: That standing alone, is that fatal if
10 in fact they knew about and authorized the statements?

11 MR. WATSON: I think most of those where they say
12 Bresson and Lubischer knew about and authorized them is not
13 fatal to our motion. Because it's alleged that upon
14 information and belief Lubischer and Bresson knew about and
15 authorized those statements.

16 THE COURT: Not fatal to your motion, fatal to the
17 counter complaint. In other words, let's say for example and
18 this is perhaps rhetorical hyperbole. Mr. Bresson and
19 Lubischer had a scheme to get back at these people who left.
20 And they organized this plan and went to Sizelove and Milovac
21 I believe are the names, and said, Hey you go out there and
22 you make it clear to the work force that they do something
23 like this there's going to be trouble. And the way we're
24 going to do this is you do this, and this and this.

25 So they never published the statements themselves

1 but they hired, they engaged their subordination to do their
2 bidding for them. The fact that they did not personally
3 publish the statements, is that fatal to the counterclaim or
4 do you acknowledge that through concepts of agency they're
5 responsible for what somebody else puts out with their
6 authority?

7 MR. WATSON: It's a very good question, Judge. I
8 hadn't really thought about it.

9 THE COURT: You raised it.

10 MR. WATSON: Off the top of my head my belief is
11 that if they authorized certain statements to be made that
12 they would be responsible for those statements.

13 THE COURT: Thank you.

14 MR. WATSON: Of course we say they didn't. Now--

15 THE COURT: We're only at the pleading stage.

16 MR. WATSON: Okay. The other obvious conclusion,
17 Judge, is that Nexteer would have to do something to address
18 the situation it was faced with to stem the tide. Now the
19 company's response came from Frank Lubischer, and that
20 response had two comments. Lubischer drafted a memo, sent it
21 to his reports. And that memo basically criticized the
22 counter-plaintiffs for the manner in which they left the
23 company. And in that memo, Lubischer did use words like
24 loyalty, lack of loyalty, untrustworthy, lack of integrity to
25 let the remaining employees know that the manner in which the

1 counter-plaintiffs left the company, no notice whatsoever -
2 that type of thing, was improper. That was wrongful and that
3 should not be emulated by other Nexteer employees.

4 THE COURT: And you--and you think that that is
5 non-extricable statement?

6 MR. WATSON: I do. Number one I think it was
7 reasonable under the circumstances and does not constitute
8 defamation. And number two, as the company's representative
9 to address this really dire situation, Mr. Lubischer had a
10 qualified privilege to issue such a statement. He had a
11 qualified privilege to make a response.

12 THE COURT: Regardless of content?

13 MR. WATSON: Not regardless of content.

14 THE COURT: So if somebody attacks your--your
15 integrity, your veracity, your character..., if the definition
16 of defamation is a communication that tends to so harm the
17 reputation of an individual as to lower that individual's
18 reputation, and--and calling somebody out and saying you lack
19 integrity, you're not to be trusted - those sort of words,
20 even in the context of explaining to a workforce we've had
21 some people leave, we're going to grin, bear it and come out
22 better on the other end and do all the things you do to
23 manage that remaining workforce. But to, to use some of
24 these words with impunity and say well because we have a
25 qualified privilege..., I just want to understand your argument

1 that that's okay.

2 MR. WATSON: Well, I think he had to come out
3 pretty strong to let the workforce know that what was done
4 was wrongful. And the use of the words disloyal, not
5 trustworthy, lacking in integrity to describe the manner in
6 which they left the company I felt was--was justified.

7 THE COURT: Well what if they left because they
8 righteously didn't like working there, got paid more by
9 somebody else, had been treated like trash and wanted to move
10 on?

11 MR. WATSON: They--they left in a very
12 unprofessional inappropriate manner.

13 THE COURT: From the employers perspective I
14 understand that. But the way they present it to the public,
15 I don't think, I don't know that they can just do as they
16 please and hide under the--the rubric of qualified privilege.
17 Where's the limit?

18 MR. WATSON: I think the limit is beyond the words
19 that were used by--

20 THE COURT: So let's--let's move on to --

21 MR. WATSON: Mr. Lubischer.

22 THE COURT: Let's move on to the comment "illegal
23 activities and stole property from Nexteer" --

24 MR. WATSON: Those--

25 THE COURT: Would that be protected?

1 MR. WATSON: Those comments, yes. Well those
2 comments weren't made by any of the defendants,--

3 THE COURT: They were made according to--

4 MR. WATSON: --counter-defendants.

5 THE COURT: --according to the pleadings with their
6 knowledge and authority that they called somebody words that
7 are I understood to be defamatory per se.

8 MR. WATSON: They allege in their pleadings that
9 those words were made upon information and belief. And
10 number one they weren't there to hear the words so it's
11 probably hearsay anyway. But even getting beyond that if
12 it's alleged on information and belief we don't believe that
13 that's alleged with the specificity required to hold Nexteer
14 liable. There's no statement about when it was authorized,
15 where it as authorized, what words were said and authorized
16 in these comments. They're speculating in regard to these
17 comments being made and they were authorized by Bresson and
18 Lubischer based on information and belief and nothing else.

19 THE COURT: Which allegations in your amended
20 complaint are not allegations, are not beliefs that you hold,
21 your client holds, to be true subject to proving at trial?
22 So, you may hold them dear to your heart, but they're
23 allegations upon information and belief or otherwise.

24 MR. WATSON: Many--many of them are, Judge.
25 Defamation claim is a little different because under the law

1 defamation has to be pled, pled with specificity. And the
2 law requires that in pleading a defamation claim you have to
3 plead the word said, who heard the words--

4 THE COURT: I understand. But you were--you were
5 defending by saying because they were prefaced by the words
6 upon information and belief. My comment is every allegation
7 in every complaint is an allegation; it's not a proven fact
8 until you prove it. And so they have arguably, if you take
9 out the words "upon information and belief" it's just a
10 standing allegation like many are in your complaint. I'm
11 sorry. Go ahead.

12 MR. WATSON: We believe the information and belief
13 really connotes that they don't have any idea whether or not
14 Lubischer or Bresson authorized the statements and they
15 certainly say nothing in the complaint which indicate other
16 than the belief that they did it, nothing that indicates that
17 they did.

18 We also claim that in regard to Lubischer's
19 response, there was a qualified privilege, Judge. And since
20 there was a qualified privilege for Lubischer to make that
21 response the counter-plaintiffs had to establish malice. And
22 we submit that they haven't established malice by Nexteer,
23 Bresson or Lubischer. What happened in this case was mass
24 defections, they go to a competitor, overall there had been
25 19 Nexteer employees went over to Mando. Nexteer was under

1 the law entitled to respond to that. And in regard to that
2 response the only way it's defamatory is if plaintiffs can
3 show malice. And we submit that in their complaint they've
4 really not pled anything that Lubischer did that constitutes
5 actually malice or that would constitute malice. Lubischer
6 did say some things about him in that memo, loyalty,
7 trustworthy, integrity, but that doesn't establish that
8 Lubischer harbored malice for them and they haven't
9 sufficiently alleged malice.

10 A few other points I would like to make--

11 THE COURT: If I can stop you there. In the ideal
12 world, how would you like to see malice specifically pled?

13 MR. WATSON: I think to show malice they would have
14 to show that Lubischer had some idea in his mind to try to
15 get back at them to punish them. To try to belittle them
16 that there some was ulterior motive that Lubischer had other
17 than to criticize them and therefore let other company
18 employees know that look, what was done was wrongful and
19 shouldn't be emulated.

20 THE COURT: So if we look to the counterclaim,
21 where is it wanting?

22 MR. WATSON: It should be something personal or
23 vindictive motive. A personal or vindictive motive I think
24 would constitute malice. Or if Lubischer actually knew the
25 statements were false or just disregarded whether or not they

1 were false.

2 THE COURT: Again, we're at the pleading stage.
3 You're arguing the complaint should be dismissed because it
4 doesn't plead malice sufficiently.

5 MR. WATSON: Yes.

6 THE COURT: And I'm trying to pull out of you, Why.
7 not? Why is this complaint not sufficient, because they do
8 use the word malice?

9 MR. WATSON: They say malice, but malice has to be
10 pled with specificity. And they have to show underline
11 actions or statements by Lubischer which establish or could
12 establish if they prove what they plead, that he had some
13 personal vindictive purpose or motive in making the
14 statements he did. And what we're saying is what he said was
15 on behalf of the company to protect the company and to
16 dissuade other employees from emulating the behavior of the
17 counterclaims.

18 THE COURT: What's--

19 MR. WATSON: And that's not malice.

20 THE COURT: Let's go to your most recent pleading
21 from last night. I think it's entitled your reply to
22 counter-plaintiffs response to Nexteer's motion to dismiss
23 counterclaims.

24 MR. WATSON: Okay.

25 THE COURT: You attached two unpublished opinions

1 representing your position that malice has to be specifically
2 pled. In exhibits 2 and 3, the way I read them it seems to
3 be fairly liberal. In *Smith versus Morris*, the appellate
4 court found that the trial court was wrong and reversed the
5 finding that they had not pleaded malice with sufficient
6 specificity. General allegations that privileged statements
7 were false or malicious are insufficient referring to *Kefsen*.
8 However, we find that the plaintiff did include the alleged
9 defamatory statements with his pleading. It doesn't give me
10 much insight on--on specificity other than the trial court
11 was reversed.

12 But interestingly on the next case behind tab 3, I
13 believe your reference in your pleading to the footnote
14 regarding a different cause of action, notwithstanding, the
15 opinion concludes, plaintiff alleged the defendant Marcia Nix
16 made the statements described above to the police while
17 knowing them to be absolutely false and without foundation or
18 basis and fact. If this allegation is proven plaintiff will
19 have shown the defendant Nix acted maliciously with respect
20 to her communication. It doesn't give me much insight on how
21 to plead malice without saying you did it maliciously.

22 So what more can we demand of Mr. Shea other than
23 to put you on notice that he's claiming *Lubischer* and *Bresson*
24 were malicious? This was not negligent. This was
25 intentional. They knew what they were doing and they knew it

1 was false. And unless they prove their case at trial it's
2 going to be false.

3 MR. WATSON: For malice my understanding is you
4 have to show some underlying facts from which the court could
5 conclude that there was a personal or vindictive or improper
6 purpose like show that Lubischer hated these guys or he had
7 arguments with them and he wanted to get back at them or
8 something and therefore he made these statements. In this
9 case it seems to me that what they've spent most of their
10 time alleging is they didn't like what Lubischer was doing
11 and they went and told Lubischer's bosses about it, and the
12 bosses didn't move quickly enough and therefore they quit and
13 that's when Lubischer published the, I think it was an email
14 criticizing their behavior. But there wasn't a showing by
15 them, that there was some personal vindictiveness or problem
16 that Lubischer really had with them which would lead to a
17 conclusion of malice. So all they have is the allegations
18 that there were--that there was malice and the critical
19 statements. They don't have the underlying factual scenario
20 that would lead to a conclusion that the statements were
21 based on malice.

22 THE COURT: So if Mr. Shea enhances his pleading
23 supplemental with some more allegations you'd be satisfied?

24 MR. WATSON: No. But that might defeat my motion,
25 Judge, to be perfectly honest. I did want to--want to

1 mention a few points.

2 Laurent Bresson should be out of this. There is
3 nothing in regard to him in this case. He was the president
4 of the company. They're saying well he must have authorized
5 his statements. And that's as far as they go. No statements
6 by Bresson. He ought to be out--

7 THE COURT: But that's--that's exactly why I
8 covered that issue 5 minutes ago. I--I think we came to an
9 agreement that if they prove what they pled, that he knew and
10 authorized he has exposure to liability.

11 MR. WATSON: Well if he authorized statements, but
12 my point with that is when they claimed he authorized
13 statements they didn't give any specifics on when he
14 authorized them-- authorized it, who he authorized it to, who
15 was there. That's not pled with specificity for this
16 defamation claim. They just cannot say that, okay these
17 folks authorized these statements and therefore they're all
18 liable. They got to give some specifics in regard to that
19 conversation where those statements were authorized. They
20 didn't do that. Defamation, defamatory statements have to be
21 pled with specificity and here we're one step removed from
22 the defamatory statements. They're saying he authorized
23 defamatory statements; that's got to be proven with more
24 specificity than to say the company president authorized
25 this. I don't agree with that, Judge. There's no

1 specificity there. Bresson should be out of this. Plus he
2 has the qualified privilege too and there's absolutely no
3 showing of malice by--by Bresson. And so Bresson really
4 should be out of this case.

5 I wanted to mention as we said in our pleadings
6 that Nexteer's pleadings are protected by an absolute
7 privilege and that's just as a matter of law. Lubischer's
8 actions and statements even if they rose to the level of
9 defamation are protected by the qualified privilege and we've
10 discussed malice. We don't feel counter-plaintiffs have
11 sufficiently alleged malice to overcome that, those
12 privileges. And Lubischer's actions, we submit were
13 reasonable under the dire circumstances with which he was
14 presented.

15 The abuse of process claim is pretty simple. As to
16 abuse of process counter-plaintiffs must establish both that
17 Nexteer filed its pleadings for an ulterior purpose. And
18 there was an irregular act in the use of process. They have
19 not sufficiently alleged either. There's nothing alleged in
20 the complaint which would demonstrate that Nexteer filed this
21 case for an ulterior purpose. The counter-plaintiffs keep
22 saying, well, gee, Nexteer filed this suit and it made all
23 these allegations.

24 The fact of the matter is, Judge, 19 key Nexteer
25 employees left the company without notice. We believe took a

1 lot of information with them and they got sued. There's
2 nothing to indicate that there was some bad faith by Nexteer
3 in bringing this action or Nexteer just did it to harass
4 employees. The only thing that indicates that are the
5 conclusory statements in the counter-plaintiffs complaint
6 that Nexteer did this to harass them and so forth. But if an
7 entity, any entity has defections to that degree, 19 key
8 folks leaving all at once without giving notice there's
9 likely going to be a suit flowing from that and one can't
10 conclude that just because there was a suit there was an
11 ulterior purpose. The counter-plaintiffs were required to
12 plead facts showing ulterior purpose and they didn't.

13 The other thing they didn't do was show an
14 irregular use of process. We filed a complaint. I filed it
15 myself I think. I came up here filed it and tried to get the
16 TRO and the Court said, well no, wait until we have a
17 hearing, we're going to get everybody here and then we moved
18 for TRO. That's basically what we did. That wasn't any
19 irregular act at all. They haven't showed any irregular act
20 in the use of process. So they haven't satisfied that
21 requirement either. So for that reason, those two reasons
22 the abuse of process claim should be dismissed, and we submit
23 the whole counter complaint should be dismissed.

24 THE COURT: Thank you. Mr. Shea.

25 MR. SHEA: Good afternoon, Judge. David Shea on

1 behalf of the counter-- counter-complainants. Your Honor, I
2 want to--I want to just quickly get out of the way a few
3 points. One is that the motion to dismiss the defendants
4 filed and that the--and that Jerome argued principle argument
5 there was MCR 2.111(B)(1), and to say this is a notice
6 pleading state. And we need only make allegations in the
7 complaint that provides notice to the other party of
8 generally what the claim is, and that that we have more than
9 satisfied that requirement with the specificity that's been
10 pled in this case.

11 Now, the Court has asked questions about malice and
12 is struggling or had asked Mr. Watson to give a definition.
13 That definition has actually already been given by under the
14 case law in the *Prysak* case. And it's in the context of the
15 qualified privilege. *Prysak* says that, a plaintiffs may
16 overcome a qualified privilege only by showing that the
17 statement was made with actual malice, i.e., with knowledge
18 of its falsity or reckless disregard of the truth. That is
19 the legal definition of malice and it is the common man's
20 definition of malice, it is defined in the cases. And MCR
21 2.112(B)(2), say that we don't need to plead malice with
22 specificity. It's a court rule directly on point with that.

23 THE COURT: Would you agree though that's been
24 supplemented by case law, both .111 and .112 I understand is,
25 it's there but the case law says different.

1 MR. SHEA: Well, the case law that I just cited
2 says that if we plead a reckless disregard for the truth,
3 then we have pled malice.

4 Now, these five defendants quit their jobs and went
5 to Mando and they have no restrictive covenant, they have no
6 non-compete; they have the right to do that. I don't think
7 that there's any doubt of that. Yet, we know that there had
8 been statements and I have cited them specifically and I
9 cited dates when I can cite the dates, and I've cited the
10 person who said them and I've cited the writings that they
11 came from. But ultimately Nexteer, Mr. Lubischer, and I
12 believe through Mr. Bresson who is president of the company
13 and is also a key high level manager said that these
14 gentlemen stole, that these gentlemen lack integrity, that
15 these gentlemen are disloyal, that these gentlemen breached
16 their contracts, that these gentlemen demanded equity in the
17 company and when the company wouldn't give it they--they left
18 for more money.

19 THE COURT: And you attribute those directly to Mr.
20 Bresson?

21 MR. SHEA: I attribute them to..., we know that they
22 came from Mr. Lubischer and I think that discovery will show
23 that it came directly from Mr. Bresson.

24 THE COURT: At this point you haven't alleged that.

25 MR. SHEA: Well I've alleged upon information and

1 belief that all of those--each of those allegations were--
2 were authorized by Lubischer and--

3 THE COURT: I understand. I'm just trying to make
4 sure we're on the same page.

5 MR. SHEA: Okay.

6 THE COURT: You've not pled at this point that he
7 personally said those words.

8 MR. SHEA: That is correct.

9 THE COURT: Okay. And same with Lubischer, I
10 think that was all upon authority and knowledge.

11 MR. SHEA: Not correct in one regard. Lubischer
12 was the person that put together--

13 THE COURT: The power point.

14 MR. SHEA: --the power point presentation and
15 distributed that to all of the employees of Nexteer. Well
16 distributed to the senior the man, to the managers, too then
17 distributed to the remainder of the employees at Nexteer.

18 THE COURT: Okay.

19 MR. SHEA: So, Lubischer's fingerprints are
20 directly on that particular act of defamation. But you know
21 one, one of the things that we have in our pleading is the
22 statement that, from Lubischer that that these gentlemen's
23 disloyalty and leaving the company puts the livelihood of the
24 families that remain at Nexteer at stake. And as a result of
25 that Christian Ross's young daughter got an email or a

1 voicemail from a 8th level engineer saying, How is your family
2 doing? That right there shows the type of sneer campaign
3 and its affects to people who living in Saginaw, growing up
4 in Saginaw have to now endure because the entire family of
5 Nexteer have been told of these defamatory comments.

6 Judge, what I--what I am thinking in my head is I
7 sound like I'm giving you a closing argument. And that's the
8 frustrating part is that Jerome and I are up here giving you
9 closing arguments. This is not the place to be giving you
10 closing arguments; it's a motion to dismiss our complaint on--
11 --on the pleadings based on 2.116(C)(8). The question is:
12 Have we pled a defamation claim? Have we pled false remarks?
13 We've clearly pled them. It is now our job to go prove them.
14 We believe that we can prove them. Jerome believes that he
15 can win. That's what cases are made of. But we certainly
16 have pled with sufficient specificity a defamation claim.
17 Their argument is that their communications are privileged
18 either by absolute privilege, which I don't understand at
19 all, or qualified privilege. Well if you--if we prove malice
20 they don't have a privilege at all because under Prysak, that
21 extinguishes a qualified privilege. But look at what they
22 have to under the Prysak case, what they have to prove in
23 order to maintain that qualified privilege. They have to
24 prove good faith in the comments. They have to prove that
25 there was an interest to be upheld. They have to prove that

1 it was limited and scoped to its purpose. They have to prove
2 that there was a proper occasion on which they said it. And
3 they have to prove that they said it to the proper, to in a
4 proper manner and to proper parties. Those are all deep
5 questions of fact, Your Honor. I think that's an uphill
6 climb for Nexteer and the counter-defendants and third party
7 defendants. Yet their brief doesn't address those fact
8 questions at all probably because there's no way that one can
9 say that they had good faith in saying that the, that my
10 clients leaving are going to cost families their jobs.

11 THE COURT: When you talk about Prysak, and I have
12 pulled it out, I'm still struggling with this malice issue.
13 It defines actual malice as with knowledge of its falsity or
14 reckless disregard of the truth. Then in what would appear
15 to be in reference to a (C)(10) motion, general allegations
16 of malice are insufficient to establish a genuine issue and
17 material fact. Well we're not in that context. We're in a
18 (C)(8) context but the phraseology is the same, general
19 allegations of malice are insufficient. Can you walk through
20 for me in your counter complaint where you've addressed the
21 issue of malice either generally or specifically?

22 MR. SHEA: Certainly. The standard how I believe
23 that the law defines actual malice is with knowledge of its
24 falsity and reckless disregard to the truth. They say that
25 my clients lack integrity, yet I cite throughout the

1 complaint their last reviews which gave them the highest
2 marks that Nexteer could award for trustworthiness, and
3 integrity. It's a lie and the complaint shows that.

4 The allegations that plaintiff stole from Nexteer...
5 Judge, we are now..., they left in September of 2013. We are
6 now 9 months into this case and Nexteer has not told us one
7 time what it is that these people stole. They have not
8 defined one trade secret that has been taken, despite the
9 fact that we've had a TRO hearing which, Your Honor, found
10 that you could not even begin to make a decision because they
11 hadn't alleged a trade secret that had been misappropriated
12 or what item that had been stolen. They didn't do it in
13 their amended complaint. We filed a motion to dismiss the
14 claim and they said that they are allowed to plead it
15 generally. We've submitted discovery, simple interrogatories
16 asking them to define what it is that they stole. And they
17 still to this day have not produced one fact to support that
18 claim. That is so when you say that my client stole, when
19 they said that, did they say that with a reckless disregard
20 for the truth? Clearly. Because they can't even define what
21 they stole 9 months later.

22 THE COURT: Have you pled that in your complaint?

23 MR. SHEA: I think that last one I didn't plea.

24 The first one that I was telling you about I did plead. I--I
25 have--

1 THE COURT: I find--

2 MR. SHEA: And if the Court wishes for me to simply
3 add how I, the acts of reckless disregard for the truth in
4 the complaint I would be happy to do so. If probably... and I
5 regurgitated this to you a few times and I don't need to get
6 on my soapbox to do that, but if that would make everyone
7 feel more comfortable I'll be happy to do that. But there is
8 a plethora of those facts that that I could plead that would
9 show the either, A. reckless disregard for the truth at the
10 time that the defamatory statements were said or the actual
11 knowledge of their falsity at the time that they were said.

12 THE COURT: Okay.

13 MR. SHEA: Bill Horton handled me--handed me the
14 counter complaint with a star by paragraph 117, we pled it.
15 But I believe that the Court--Court's position is that, is
16 asking whether we pled it with enough specificity.

17 THE COURT: Exactly, that's what I had highlighted
18 too. That's..., I could be wrong. That's the only place I
19 found the word "malice" in your 126 paragraph complaint.

20 MR. SHEA: And it is the only place that you'll
21 find it, only because of the--of the law and the court rule
22 that I cited which indicated that malice need only be pled.
23 It didn't need to have specifics. If we want specifics I'll
24 be happy to go back and change that.

25 THE COURT: Okay.

1 MR. SHEA: And I can do that very quickly. But
2 that certainly isn't the basis to send us packing on the
3 defamation claim.

4 What Mr. Watson says is that Mr. Bresson and Mr.
5 Lubischer were dealing with a negative situation and they had
6 to come out pretty strong. And so because they had to come
7 out pretty strong he believes that they're entitled to say
8 whatever they want to. They could call my clients rapists,
9 whatever it took in order to communicate to the Nexteer
10 employees that they had done something very dishonorable. It
11 leads into the abuse of process claim that we've made, Your
12 Honor. And if I segue into that I would appreciate it.

13 THE COURT: Go ahead.

14 MR. SHEA: The problem that Nexteer has from our
15 position is that they didn't have any of their key employees
16 under any type of restrictive covenants, which is unusual for
17 a company this size and unusual for the quality of employees
18 that they had. But regardless, they didn't have anyone
19 under any type of restrictive covenant. So when this group
20 after struggling with Nexteer and not liking where they work
21 and finding a place where they do like where they work,
22 decide to leave. Nexteer is terrified because they don't
23 have any restrictive covenants that will prevent people from
24 flying out the door. I believe and my clients believe that
25 this lawsuit is a product of--of that problem. Not a product

1 of the merits of what they're alleging. The problem is that
2 if they don't file a lawsuit and send the message that we
3 will burn these people to the ground, that we will make
4 heavy-handed allegations and we will fight against them. It
5 serves as disincentive to those who do not have restrictive
6 covenants to stay where they're at. They also started a
7 campaign to offer people restrictive covenants. You know
8 they've started doing that. But--but the problem is is that
9 they were, their feet were stuck in cement on this thing.

10 You--Mr. Watson was right, they had to come out
11 strong. They had a problem. The problem wasn't the five--
12 these five clients leaving. The problem was all the people
13 that have left behind that say, you know what, I can leave
14 too, and there's nothing that would stop me. That's why this
15 case..., that's why I felt it was appropriate to plead abuse of
16 process because that's exactly what an abuse of process claim
17 is. It's a claim that is filed for an ulterior motive and
18 used, most importantly used for an ulterior motive meaning
19 that this case for as long as it exists has a chilling effect
20 on the remainder employees at Nexteer, and that's the real
21 purpose of this case. The consequence of it is that these
22 five have to have their character dragged through the mud.
23 And as I've said to you in the past, the only thing a man
24 owns is his character. And so if that's what they have to do
25 in order to still the tide of the employees and that's what

1 they're going to do.

2 Your Honor, I should--I should have the right to
3 seek discovery to prove that claim because it is apparent on
4 its face, based on the facts that I've just laid out to you.
5 And when you combine that with the fact that they have not
6 produced one piece of evidence in 9 months to support their
7 claim, not one answer to it, not one answer to an
8 interrogatory, not one answer to one of your questions, Your
9 Honor, then you--then that doesn't pass the smell test. You
10 have to--you have to sit back and go, What is going on here?
11 I mean there are one, two, three, four, five, six, seven,
12 eight, nine lawyers in this courtroom right now. There's
13 probably a couple I..., who knows how many lawyers there are.

14 THE COURT: We're missing many others.

15 MR. SHEA: A lot of lawyers. A lot of lawyers.
16 We haven't gotten one fact on the table to you other than
17 pleadings. They're the plaintiff. They're the ones who
18 threw the hat in the ring. It's been 9 months. Now, as a
19 practicing attorney that's odd to me. As a sitting Judge I
20 suspect it's odd to you. So you have to then step back and
21 go, What is going on here? And over the course of those 9
22 months it will be very interesting when we find out in
23 discovery exactly how many people have left because I bet you
24 it's not that many. And I bet you if we were to ask a lot of
25 those people which we couldn't certain depose all the people.

1 But I bet you we ask a lot of people they say, I'm scared,
2 terrified, I'm terrified to leave Nexteer because of what
3 they're doing to these five guys back here. That is a
4 classic abuse of process claim.

5 Now, I'll add one last fact and then I'll--I'll
6 shut up.

7 There has been, and I pled this in the complaint,
8 numbers of people that have left Nexteer and gone to
9 competitors, people of equal level as those that I represent,
10 and there has never been a lawsuit filed against them. There
11 have been people that have come in from competitors in the
12 same situation as my clients have left Nexteer that they've
13 come into Nexteer and Nexteer has welcomed them with open
14 arms. Not with horror that they would have disloyally left
15 their employer but with open arms. The suggestion that this
16 kind of activity is so aberrant that you could then file a
17 case and call people thieves and liars and the worst thing
18 that you can say about a person's character because of that
19 mere fact when they didn't apply the standard to themselves
20 and they haven't applied the standards to the other employees
21 that have left, again leads you to question, What is it that
22 these folks are doing? And what I'm asking the Court to do
23 is let me go find out. Thank you for your time, unless you
24 have other questions.

25 THE COURT: I will.

1 MR. SHEA: Thanks.

2 THE COURT: Mr. Watson.

3 MR. WATSON: I don't agree with very much of that,
4 Judge, of course. And I think we get a little far field. We
5 filed our motion to dismiss under (C)(8) claiming that the
6 complaint has not been adequately pled. So you look at the
7 complaint, accept the allegations pretty much is true and
8 then determine whether there is sufficient pleading to
9 support a claim. And I think we get a little far field from
10 that.

11 Let me reiterate a few points. Mr. Shea says, oh
12 there's not one fact, nothing has been produced and so forth.
13 We've heard that a lot of times in this case. One thing is
14 that after the individual defendants left Nexteer we had to
15 send a demand letter to Mr. Shea asking for the return of
16 Nexteer materials. Because these employees were obligated by
17 contract not to take anything and we received two boxes of
18 documents back and nine thumb drives and flash drives. And
19 on those thumb and flash drives were--was various
20 information, which we claim was trade secret and
21 confidential. And if the Court will recall we submitted Rob
22 Milovac's affidavit, the end of it contained 5 paragraphs of
23 information which was taken on those flash drives and thumb
24 drives which we said constituted trade secrets. Your Honor,
25 didn't agree with this in regard to that, and I understand

1 it. But it's hard for me to sit here and listen time after
2 time to them saying we haven't shown one fact that they took
3 anything, because we have. And we're pretty close to
4 submitting our discovery responses which will show a whole
5 slew of other stuff that was taken.

6 In regard to Laurent Bresson, there still hasn't
7 been any specificity in regard to the company president. And
8 there hasn't been any underlying facts shown which would lead
9 to a conclusion of malice. I think Mr. Shea is right about
10 the court rules. But I think the case authority in this case
11 is basically trump the court rules and say that if you allege
12 malice you just can't say "malice" you have to show some
13 underlying facts which show a vindictive purpose or personal
14 motivation or something wrongful which leads to a conclusion
15 of malice. That hasn't been done whatsoever. And Bresson
16 really should not be included here.

17 As to the fact questions that, there are a lot of
18 fact questions. There really not fact questions here because
19 we're just looking at whether or not the complaint adequately
20 states a claim. So I don't agree with the whole argument
21 about fact questions.

22 In regard to people leaving Nexteer and going to
23 competitors or Nexteer taking employees from competitors;
24 I've heard that so much and I want to respond to it. Number
25 (1), is a red herring, it has nothing to do with this. It's

1 the same as the argument about Nexteer agreeing to arbitrate
2 something in Korea. It doesn't have anything to do with
3 anything, and shouldn't even be brought up here. But the
4 fact of the matter is Mr. Lubischer, when he left TRW he gave
5 6 months' notice and he was one person, and he left with one
6 other person. And then one other TRW person came months
7 later to Nexteer. Here we got five key employees leaving
8 within 36 hours and a total of 19 employees leaving within 2
9 or 3 months. It's quite a different situation in this case.

10 Mr. Shea mentioned that Nexteer gave his clients
11 the highest ratings on their performance reviews and that's
12 true. And that statement cuts both ways. In one way it
13 tends to show that there was no long-term bad feelings in
14 regard to the clients. And what was stated about them only
15 pertain to the situation where they left Nexteer with no
16 notice. There was nothing that Lubischer who was their boss
17 and could've seen that they got horrible ratings, there was
18 no, nothing he had against any of these guys. What Lubischer
19 was concerned with was them leaving and leaving Nexteer
20 totally in the lurch. Which they did and which warranted
21 criticism and which was very unprofessional. And there is no
22 doubt about that, Judge, they deserved to be criticized. Did
23 it go too far? That's up the Court to decide.

24 And the statements in regard to people stole.
25 Lubischer didn't say they stole. Bresson didn't say they

1 stole. I think the stealing allegation basically comes from
2 pleadings that were filed by the attorneys and that's in
3 regard to our trade secret and other claims. And pretty much
4 a necessary element that they took stuff that they
5 shouldn't've taken. And the fact of the matter is they did
6 and it was admitted. We demanded it back and it was
7 returned, at least some of it. We think most of it wasn't.

8 As to the real purpose of the case, we filed this
9 case just to get back at them or something of that nature.
10 There's no evidence of that. This case was filed to assert
11 trade secret by violations, interference with contracts,
12 breach of contracts. There's nothing to show that we didn't
13 file this case for the reasons we--the reasons the complaint
14 indicated it was filed.

15 The calling folks liars and thieves. Lubischer and
16 Bresson didn't do that to the extent it's contained in the
17 pleadings. There's an absolute privilege.

18 Overall, Judge, we think that malice gets rid of
19 virtually all the def--alleged defamatory statements, the
20 lack of the showing of malice and the fact that we had a
21 qualified privilege where they have to show malice. That
22 gets rid of most of it. And certainly there's nothing in
23 regard to Bresson.

24 As to the abuse of process. They're not even close
25 there. They haven't alleged irregular act or anything

1 outside the normal course of events. And they just can't say
2 well this seems to be irregular and outside the normal course
3 because we don't think we did anything wrong and you do.
4 That's not sufficient. If that is sufficient we can turn
5 around on them and file a claim for abuse of process with
6 their counter complaint. Thank you, Judge.

7 THE COURT: Mr. Shea. Mr. Shea, what do you make
8 of the argument that in fact your clients took some property
9 that had to be returned? Does that make the allegations that
10 they stole or conducted illegal activities a true statement
11 which would be a defense?

12 MR. SHEA: It doesn't, but it sure does make me
13 irritated. The--the contract, Your Honor, requires that
14 upon resignation or that following resignation, termination
15 of employment the--the, my clients are obligated to promptly
16 return any property that they have. So I'm the one who
17 reached out to Jerome, (it wasn't Jerome in particular, but
18 it was Richard, his partner), and said that we have some
19 property. I'll tell you what type of property it is. Tony
20 Dodak has in his basement some books that he's acquired over
21 some 30 years at General Motors and papers and junk. And we
22 had on their computers whether they were at home or whether
23 they were at work, a mixture of personal and private
24 information, personal and work related information of which I
25 told the employees I did it, I told them download it onto a

1 hard drive. And then I called Miller Canfield and said, What
2 should I do with this stuff? And they said, here's a
3 protocol that we want you to follow, please give that stuff
4 to a third party administrator and they will go through and
5 separate out the personal to the private. And that's what
6 they did and they got all their private things back. And you
7 know what we get? We never got our personal stuff back,
8 ever. I've asked them five times for it back and it's gone.

9 The suggestion that we stole that information is
10 absurd. Actually what we were doing was following our
11 contractual responsibilities to promptly return it. And that
12 has always been the context of which we have functioned in
13 good faith. And the type of property, I'd love for you to
14 order them to show you what property they're talking about,
15 you would laugh, Your Honor, at some of the stuff that
16 they're talking about here. We're talking about stuff that
17 is, that is so irrelevant that it exists in the basement of
18 the employees.

19 So when they say that they stole information that's
20 not the information they're talking about. When they say
21 they stole information, what they're talking about are trade
22 secrets. What they're talking about is how you make an EPS
23 system, that's something unique to Nexteer. They're not
24 talking about Tony Dodak's book from 1972 about engineering.
25 So that's why I get irritated over that argument that I've

1 heard.

2 THE COURT: Mr. Shea, you've asserted that
3 everything is pled with specificity. Correct me if I'm
4 wrong. I don't find anywhere in the amended complaint where
5 you identify with specificity the recipient of the
6 statements. You've made reference to 18 employees here, to
7 the staff here but I don't find anyone saying, and he told
8 John Doe this.

9 MR. SHEA: Well with the Lubischer statements, he
10 passed it out to all his key managers with the direction to
11 pass it out to all employees of Nexteer. We know that to be
12 true. So I did make that allegation.

13 As to the other folks I, when I gave specific
14 information..., for instance, they had a retirees group come
15 in, I think there were 18 people in number. I only know one
16 of them; we'll have to find out the other 17. But they were
17 told lies about these five gentlemen. These are senior
18 elders that are around town that you--you would likely
19 recognize, they're that prominent. The--the meeting that was
20 held where Mr. Sizemore had said that the--the five, my five
21 clients were engaging in illegal activities was actually told
22 and pled to Troy Streeter who is sitting right there in the
23 plaid; he was part of a group of people that had stayed on.
24 And that information was told to him and his fellow employees
25 in a specific meeting that disgusted him enough to quit. So

1 I think I have pled that with specificity.

2 But again, Your Honor, just as what happened in the
3 original motion to dismiss with Nexteer, if these pleadings
4 are insufficiently pled then I will be happy to amend them in
5 order to satisfy both the Court and the law and Nexteer if
6 they want more specifics. My wordsmithing is not perfect, I
7 know that. I mean I'm thinking that I'm not really sure that
8 I put in there on the abuse of process claim the idea of--of--
9 --of Nexteer's employees not being under restrictive
10 covenants. That's a fact that I've known about. And I'm not
11 sure it's there. If it's not there I'll go put in there if
12 they want more specifics.

13 But I personally believe that this you know getting
14 bog down in these details of pleadings and all of us raising
15 our arms and saying, well that word is out of place and we
16 needed.... We are going to be in front of you, Your Honor,
17 for the next 3 months arguing about what it is that we should
18 allege and how we should word it. And my position is, you
19 know what, we all know directionally where we're headed and
20 let's just get to it and start getting into some discovery
21 and get the depositions done and get the case to trial and--
22 and move on.

23 And so I guess if the--if the Court believes that
24 there are more specific things that need to be--need to be
25 pled I'd ask for leave to do that just as the other side was

1 granted leave to do that. And if not I would ask you to--to
2 dismiss their motion.

3 THE COURT: Mr. Watson, as to the issue I raised.
4 Are you satisfied that you know who the recipients are? Is
5 that sufficiently pled?

6 MR. WATSON: The recipients?

7 THE COURT: The audience. The people who received
8 the defamatory statements; are you satisfied, do you know who
9 they are through the pleadings?

10 MR. WATSON: No.

11 THE COURT: So when he says the 18 managers, you
12 don't know who those are?

13 MR. WATSON: I can check with Nexteer. Personally
14 I--I don't know who they are. I know that Lubischer sent out
15 the, that power point to his direct report so I can figure
16 that out myself.

17 THE COURT: Right. So, that went to the managers
18 and then that--that--that went to another layer of people.

19 MR. WATSON: That's what they say.

20 THE COURT: So Mr. Shea is saying, look I've told
21 you as much as I know as far as identifying them by name. Is
22 that an objection of yours?

23 MR. WATSON: With the fact that Lubischer sent it
24 to the direct reports, that's not an objection. As far as
25 Lubischer supposedly giving instructions to someone to send

1 it all over the plant, yeah, I would like to get some more
2 information on that.

3 THE COURT: Again, I'm focusing on the audience.
4 One of the elements as I understood it is you got to identify
5 who the defamatory statement was made to. He has in some
6 generality talked about groups of people here and there.
7 He's never identified by name, the audience. I'm trying to
8 find out from you if that is an objection of yours that you
9 raise or are you comfortable with the way the pleadings sit?

10 MR. WATSON: I'm uncomfortable with the pleadings,
11 although, I do agree that Lubischer sent it to the direct
12 report. To the extent it went to anyone else I would like to
13 know about it.

14 THE COURT: Well it's been alleged.

15 MR. WATSON: I guess no.

16 THE COURT: Maybe you don't understand.

17 MR. WATSON: If that's the case, no, I'm not
18 comfortable. I think they should be required to allege
19 exactly who it went to.

20 THE COURT: And so when it went to all employees of
21 Nexteer as alleged, you need him to identify each of those by
22 name?

23 MR. WATSON: No.

24 THE COURT: Does he need to identify the group of
25 18 by name?

1 MR. WATSON: Yeah, the group of 18 I believe was at
2 a supposed meeting that Brad Sizelove made a statement at and
3 we would like to have those identified.

4 THE COURT: To--

5 MR. WATSON: Two Nexteer employees supposedly on
6 September 18th, Brad Sizelove and Robin Milovac told 18
7 company employees about "illegal activities". And we would
8 like to know who was there. Apparently Streeter was there.
9 We don't know who else was there.

10 Judge, if I can make one point. We have a conflict
11 in the way we see events. As to the return of information to
12 Nexteer, that informa--I agree Mr. Shea reached out to us,
13 but he reached to us after we sent a letter to him demanding
14 the information back. So that point was omitted.

15 And as far as they're never getting their personal
16 stuff back. I can check on that. I know I personally myself
17 looked through those boxes of documents, decided what was
18 personal and should go back and what wasn't and should not go
19 back, gave it to my paralegal to send it back. Now, I can't
20 recall hearing from the paralegal that it was actually sent
21 back. I assumed it was. But I will check on that because I
22 know we, at least from my perspective it was sent back.

23 In regard to taking of data and they're wanting and
24 saying we haven't produced information. Right now we believe
25 there were hundreds of gigabytes of data potentially taken

1 and we're putting together the answers so we can get them all
2 that information which they want. All of which is probably
3 relevant to this motion as you're sitting here hearing the
4 stuff, Judge. Sometimes I feel I just have to get the point
5 of view and I can't listen to all that.

6 THE COURT: Mr., thank you. Mr. Shea, you've--
7 your complaint alleges a broad spectrum of speech. As I read
8 the caselaw there's some things that although would appear
9 defamatory to some are nonetheless non-actionable either
10 because of context or because they--they fall short in some
11 regard. And I had the impression from Mr. Watson's pleadings
12 and argument that even if you get past the pleading
13 requirement of specificity some of this just isn't
14 defamatory. And I wasn't sure if some of this is given to us
15 as background like other parties have given me background.
16 Or if you're really saying some of these, each of these that
17 I can identify are defamatory and have to be defended. For
18 example., the first five quit for monetary gain, paragraph
19 84. Does anyone think that's a defamatory statement that I
20 made myself better and got a better job and got more money?

21 MR. SHEA: In the context of which it was said it
22 was, it was a defamatory statement. But they actually didn't
23 quit because of monetary gain. They quit because--because
24 they couldn't stand to work there anymore and they had made
25 that clear. Now, so I wouldn't agree on that issue.

1 THE COURT: And so its--

2 MR. SHEA: I do agree with the Court though.

3 THE COURT: And so it's untrue?

4 MR. SHEA: Well, its false--

5 THE COURT: It doesn't lower anyone's reputation
6 when they got more money.

7 MR. SHEA: Yes. If you go and you talk to the
8 retirees in Saginaw to say that you, that you walked away
9 from 20, 30 years from a company because you could better
10 yourself individually financially. And you sacrifice your
11 friends at work, Nexteer - former GM, you turned your back on
12 that for more money that is not only untrue but it does
13 defame their character in this town. It may not defame their
14 character in Birmingham, Michigan. But it does defame their
15 character in Saginaw. So I believe that that is a
16 circumstance that would stay in.

17 But there's another--there's another point that I
18 had made that you know the Court is right on but I put it in
19 there for context or color. And that's you know one of
20 these guys, Nexteer manager said to another, one of these
21 retirees that Christian Ross's father would be rolling in his
22 grave. When Christian Ross told me that he cried. That's
23 how upsetting that is to him. Is that defamatory? Well
24 it's, according to Mr. Watson would be hyperbole, of course.
25 He would say, Judge, dead people can roll in their graves,

1 it's a proven fact, so therefore that would be an absolute
2 defense and I would ask that you--I would ask that you
3 dismiss that particular claim. But context is what the jury
4 has to hear on the extent that these people have gone to hurt
5 these five.

6 THE COURT: How is that different from an opinion,
7 Dad would be ashamed of you, he'd roll over in his grave?

8 MR. SHEA: He--it isn't. It isn't different from
9 an opinion, but when it is combined with a series, with all
10 of the things that I have in my complaint. We can't pull out
11 one statement and look at it and twirl it around and say,
12 well would that hurt anyone standing alone? No, but when you
13 label off the, in like out of a howitzer, the insults that
14 that these folks have sent my clients way, it--it matters.

15 What I'm--what I'm saying, Your Honor, is that if...
16 I don't know the answers to all these questions. I don't
17 know everyone that, I can't tell you all the Nexteer
18 employees that it went to yet because I have to do discovery
19 on that. I might not know every, to the 18th person who was
20 sitting in that room until I go and I ask the person who
21 actually spoke those words, who are you speaking to. I could
22 get a good list of them but I wouldn't be held to it.
23 There's so much within the context of discovery that I need
24 to do to substantiate these claims. That, expect that they
25 be pled as if it's cast in stone is an impossible burden for

1 me to meet.

2 THE COURT: I'm simply trying to, as we all are,
3 honor the requirements of specificity that appears to--to
4 apply to defamation. It may be difficult. But if you can't
5 do it then maybe you don't have a claim. That's Mr. Watson's
6 point. Because you have to at least plead with sufficient
7 specificity. More than just putting somebody on notice, hey,
8 we're suing you for defamation.

9 MR. SHEA: Your Honor, I could--I could, to the
10 extent that the Court wishes I could redraft the complaint
11 and say these are the defamatory comments that we believe
12 forge a basis for our client. Included in that list would
13 not be that your father rolls in his grave. But I would keep
14 it in the complaint as context. So then--then we have that
15 narrow list down. And I will take the--I understand where
16 you're going with this. So what if it's false, does it
17 recreate any damage? And I will keep that in mind when I
18 think about what that list should be. But I can do that.

19 THE COURT: So the, as I was going through this and
20 I--I started off what I considered the, the low end of the
21 spectrum. These guys went off and got more money. I'm
22 thinking, yeah, that's what we're here for. I mean that's--
23 that just didn't seem to--to me on its face to be defamatory.
24 While on the other end of the spectrum, they were charged
25 with illegal activities and stealing property. Again, that's

1 defamation per se. That's a no brainer unless the context
2 would make it fluff. You know we've all read the same cases
3 and things that would appear on their face to be defamatory
4 calling somebody a blackmailer or a traitor, in the context
5 they may not be. But at least on basic black letter law,
6 those types of words support your claim.

7 So, I'm just trying to--to--to-share with you my
8 impression and some of it is in accord with Mr. Watson and
9 some not that there's some specificity that may be lacking
10 here. Because I do think you need to go back and redo some
11 of this and address some of the concerns.

12 MR. SHEA: I'll be happy to do so, Your Honor.

13 THE COURT: As to the privileges, I do tend to
14 agree that much of what has been pled post filing (paragraphs
15 97 through 105, and 109 in particular) if you're trying to
16 use those to state a claim I'm struggling with that one. I
17 think they're privileged and for good cause. As--as the
18 cases indicate we can't be quibbling about things that are
19 said during the course of litigation, always looking over our
20 shoulders, so that one might go.

21 The qualified privilege, that applies in the--in
22 the two forms that the, that Nexteer argued have some
23 traction here that you have to address may be overcome by--by
24 malice. But where a former employee has a qualified
25 privilege for statements made to prospective employers or

1 former employees that would appear to at least take care of
2 paragraph 96.

3 The one that's more problematic though is where an
4 employer apparently may defame an employee by making
5 statements to other employees whose duties interest them in
6 the subject matter. But this has been limited to
7 supervisors, personnel department representatives and other
8 company officials having a duty that would interest them in
9 the matter. What I am not real clear about is: When we
10 talk--talk about sending information down to the low level
11 employees, every employee at Nexteer I suspect didn't have an
12 interest or a duty to know these things. If they kept it
13 internal just to those people with a need to know that might
14 enjoy a qualified privilege. But I, to Mr. Watson, the
15 extent of that qualified privilege is not unlimited and their
16 pleadings may get them around at least part of it. You--you
17 can't abuse that privilege if you, if you start telling every
18 Tom, Dick and Harry you think these people are crooks, they
19 don't have a need to know that. In a larger sense there is--
20 there's a problem I think with your pleadings. But it could
21 possibly be cured by amendment.

22 As to the abuse of process claim, my--my initial
23 feeling is I don't think that it's going to survive. You
24 allege, you're suing Nexteer for an ulterior motive or
25 purpose to cause vexation, trouble, embarrassment and or

1 damage. And at the time they knew or should've known that
2 the allegations in the complaint, the amended complaint, the
3 motion for temporary restraining order were false, at
4 paragraphs 123 and 124. But this appears to be a claim
5 asserting nothing more than an improper motive improperly
6 obtaining process. It does not successfully plead an abuse
7 of process. The ulterior purpose alleged must be more than
8 harassment, defamation, exposure to assess a litigation cost.
9 Or in the case, I'm quoting from or even to coercion to
10 discontinue business.

11 So even assuming the assertion of an improper
12 collateral purpose, the counterclaim wouldn't appear to fail
13 to sufficiently allege acts committed in furtherance of the
14 purpose beyond the mere filing of the pleadings in the like.
15 An action for abuse of process lies for the improper use of
16 process after it has been issued, not for maliciously causing
17 it to issue. As I share those thoughts with you too as we go
18 forward I think that counted suspect.

19 MR. SHEA: Your Honor, can I take a stab and file
20 an amended complaint and address your concerns? And then--

21 THE COURT: As to both counts or?

22 MR. SHEA: As to both counts because in the abuse
23 of process, I do want the Court to consider a pleading that
24 that includes the fact that there were no restrictive
25 covenants that any of the employees were under, and that this

1 is a send message case that this case is not about
2 misappropriation of trade secrets. This is a case about if
3 you leave Nexteer this is what we will do to you. And I
4 think that that is a classic of abuse of process claim.

5 THE COURT: Well that's--that's why I thought I had
6 crafted this carefully. An action for abuse of process lies
7 for the improper use of process after it has been issued.

8 MR. SHEA: Yes.

9 THE COURT: And I keep hearing you say that you're
10 arguing about the reasons that it was caused to be issued.

11 MR. SHEA: And maintained. And maintained.
12 Imagine, imagine if these five were replaced with any other
13 five that we pulled out on Nexteer, for the last 9 months how
14 many hours have we spent before you? How much money has been
15 spent paying me? Its--it's a very chilling effect on the
16 folks that are still at Nexteer, not under restrictive
17 covenants. And I think that that's the real reason that this
18 is going on.

19 THE COURT: Would that then be..., and I'm reaching
20 deep back into my memory. Wouldn't that be a malicious
21 prosecution claim?

22 MR. SHEA: For some reason I don't--I think the--I
23 think the answer is no and I can't tell you why. I remember
24 I looked at that issue and I concluded that I didn't have a
25 malicious prosecution claim. But I'll look again.

1 THE COURT: Okay. Let's take a break.

2 (At 3:03 p.m., court in recess)

3 (At 3:18 p.m., court reconvened)

4 THE COURT: I want to thank each of you for sharing
5 with me your--your thoughts today. It makes this job very
6 rewarding to have such excellent advocates for clients. It
7 is truly a privilege to see lawyers perform their craft at
8 this level. Compliments to each of you.

9 To recap on the, Mando's Motion for Leave to Amend
10 Complaint and Compel Arbitration, I think we left it
11 essentially as under advisement with the issue of how to deal
12 with the "is not applicable box". Which I realized is
13 different than the waiver box and that's why it wasn't
14 checked, because people weren't saying this is an applicable
15 arbitration clause that we waive or saying in the first box
16 we recognize its there, but we agree it's not applicable.
17 And I think that carries some--carries some substantial
18 weight going forward. I'm not sure how you, how to research
19 that issue. I'm not sure what your resources will be because
20 its, I don't suspect comes up very often to have an appellate
21 decision somewhere. And maybe it's simply an estoppel
22 argument. But I need some--some guidance there because
23 however intrigued I may be, that's a hurdle. And however
24 intrigued I may be with it I'm--I'm very much concerned about
25 dragging Mr. Shea's clients through the potential of multiple

1 forums.

2 In that regard I wasn't sure, Ms. Wald, if, if you
3 were saying that his action would be stayed until the
4 arbitration was concluded and somehow I would be obligated to
5 take the arbitrators ruling on whether not they were trade
6 secret--trade secret misappropriation. I had envisioned
7 you'd have two causes of action going on separately and come
8 what come may, but his claim would be severed off and we
9 would proceed. I'm not sure about that. I guess I'll invite
10 your thoughts on that if its--it's to be stayed or not.

11 MS. WALD: Well, Your Honor, I don't think it--it
12 has to be stayed. But my thought was that because Mando and
13 the individual defendants would be litigating the allegations
14 of misappropriation in Nexteer's complaint, whatever the
15 outcome is in that proceeding would then translate to the
16 counterclaim, in as much as the counterclaim depends if at
17 all on a finding of liability by the individual defendants.
18 I mean the individual defendants are saying you filed a
19 complaint against us and made statements that were untrue.

20 I think that the issue of the truth of those
21 statements, truth or falsity of those statements would be
22 litigated in the arbitration of necessity as they talk about
23 trade secrets and whether they were taken. I mean even this
24 issue of you know, did they steal things, it sounds to me
25 that Nexteer wants to be dealing with that--(unintelligible)-

1 -Mando because they have to look in and see was any
2 information actually given to Mando.

3 THE COURT: Am I--am I then bound by that
4 arbitrator's decision?

5 MS. WALD: We researched this issue, Your Honor.
6 You can be, you don't have to be, but I think that there is
7 an argument that says same parties, fair process. I, you
8 know, you--you can, it would be arguably preclusive unless
9 there is some reason to believe that there was an unfairness
10 or that arguments weren't permitted to be made or parties
11 weren't able to participate.

12 THE COURT: Why not have that debate in this
13 litigation and have the arbitrator subject to what we find
14 here?

15 MS. WALD: So you're suggesting that you would
16 determine liability here and then have arbitrators render a
17 decision that would essentially ratify the litigation
18 outcome?

19 THE COURT: Well, we would--we would find out here.
20 If I have to sever this off why not find out here if they're
21 true or not.

22 MS. WALD: Well my--what I think with the
23 counterclaim though is, and it sort of depends also, Your
24 Honor, on whether what you decide about absolute privilege.
25 The statements that were made after the individual defendants

1 had left, about why they left and what they did; some of them
2 have nothing to do with this, with the main litigation,
3 whether they wanted equity and that was what prompted them to
4 leave. And whether that was true or false, it's just not
5 really tied into the main complaint. So I think that there is
6 something to litigate here, that's separate. I mean the
7 reason not to--to get to an outcome here and then to carry
8 that over to arbitration is only because I think at that
9 point you've sort of lost whatever the arbitration. I'm
10 going to say the word, right, but I mean contract provision,
11 whatever that is. I think the--the import of it is not
12 really, it's not really carrying weight at that point.

13 THE COURT: Well it's, that's, and I'm struggling
14 with that because when I'm invited to split these up to me
15 the legitimacy of the arbitration begins to fall apart. And
16 then by that very argument it all comes back to letting Mr.
17 Shea's counterclaim dictate what the forum is. Because he
18 can't be dragged into arbitration and I'm not going to
19 tolerate two separate law suits going on, and add that to the
20 not applicable box.

21 MS. WALD: I mean I--I thought Mr. Shea said he
22 would be willing to conduct the counterclaim and arbitration.
23 He would be willing to consent to that. And I think we also,
24 when we go back to look at these issues we'll try and find
25 some more caselaw hopefully to guide us too on the issue of

1 what do you do with a counterclaim in this situation.

2 Because you know we've--we've talked about claims that we--
3 that we say are agreed to be arbitrated, claims of
4 non-signatories that are intertwined and then you have this
5 kind of, you know, horse of a different color a little bit.

6 THE COURT: Right. So, then add that to your list
7 of things to help me out with.

8 MS. WALD: Thank you, Your Honor.

9 MR. SHEA: And, Your Honor, would we be able to
10 also follow a separate brief on that?

11 THE COURT: Oh, if you'd like. And I think we
12 said three weeks.

13 Then with regard to the Motion for Summary
14 Disposition on the Counterclaim: Mr. Shea I think has read
15 the writing on the wall that there are some insufficiencies
16 in the pleading and will expect an amended complaint, I'm
17 thinking by July 3rd, without limitation addressing the
18 audience and the issue of malice. Those jumped out at me as
19 issues that had to be more specifically pled.

20 MR. SHEA: Your Honor, could you give me that date
21 again? July 2nd?

22 THE COURT: I thought the 3rd, the day before the
23 holiday. I think it's the last day we're open for filing.

24 The--the abuse of process claim, I'm not impressed
25 with Mr. Shea for the reason I indicated before. In what

1 you're proposing now is that you're going to amend the
2 complaint to point out that it has a chilling effect on the
3 other employees of Nexteer. That's not an abuse of process
4 that affects your clients. You're now dragging other parties
5 into this as to why it's abuse of process. So, if--if the
6 present complaint does not state of cause of action, and I
7 think that's an accurate statement, but you want to amend to
8 add something that addresses how other people feel offended
9 by the litigation. I don't see how that's going to state a
10 cause of action. In fairness though, if you can conceive of
11 a reason that justifies an abuse of process claim, I'll give
12 you until July 3rd to do that too. But I think the challenge
13 is before you. Anything else? Ms. Wald?

14 MS. WALD: No. Thank you very much, Your Honor.

15 THE COURT: Mr. Watson.

16 MR. WATSON: One point, Your Honor. It will be
17 brief. You asked me a question in regard to whether or not
18 if Lubischer or Bresson authorized those statements, would
19 they be liable for defamation. Which is a good question and
20 I wasn't sure the answer. It might not make a lot of
21 difference now because we'll get an amended complaint. But
22 my counsel here pointed out that I could possibly be wrong in
23 the answer I gave the Court. So I just want to say I don't
24 want to be held to that answer. We'll find the real answer
25 and, if the issue comes up again I might tell the Court a

1 different answer than the one I just told it. Thank you,
2 Judge.

3 THE COURT: That's...let me take a moment for a
4 second. Mr. Watson, whether you or co-counsel can address
5 this. If your clients knew and authorized a statement that
6 is defamatory per se, what would be their reason for not
7 agreeing there's liability? Why do you think you were wrong
8 in your answer when you gave it I thought without
9 qualification? How could you possibly be wrong?

10 MR. WATSON: Perhaps under agency type, well maybe
11 co-counsel would like to answer that question. But my
12 understanding is possibly under agency type principles. If
13 one of the employees have said that perhaps Mr. Bresson
14 authorized a statement that might bind the company, but it
15 might not bind Mr. Bresson. So it, perhaps it could count as
16 a statement against Nexteer, but perhaps not against Mr.
17 Bresson. And perhaps I was right with the answer I gave. We
18 just haven't researched it so it makes me nervous that I made
19 the statement to the Court and I'm not sure of what the
20 answer was.

21 THE COURT: I thought you had argued in your prior
22 pleadings that I should let Mr. Bresson go because he didn't
23 make any statements. And that's why I brought it up today
24 that just the same way that I assumed Nexteer could be found
25 liable for statements somebody else made. Nexteer is not--

1 Nexteer is a corporation, it didn't say anything. But its
2 agents said something that no one has argued Nexteer is not
3 liable for defamation. Because everyone as a lawyer probably
4 thinks they're--they could be liable if everything else falls
5 in line. They didn't--they didn't make a statement, but
6 under agency, under respondeat superior liability flows
7 through. So wouldn't the same theory by analogy apply to the
8 individual supervisor if he said with knowledge and
9 authority, you got out and you defame those people, to that
10 effect and his subbordonance went ahead and did it, they've
11 not been named in the lawsuit, but the people who originated
12 the statement, the thought, the plant of the seed, Lubischer
13 and Bresson wouldn't they be liable for what they authorized?

14 MR. WATSON: Well the answer I gave to you was I
15 thought they probably would. But I'm not sure of that answer
16 because agency law might be a little tricky here and
17 typically an employee might be able to bind the company, a
18 statement by an employer might bind the company. But I
19 haven't seen cases where a statement by an employee bound the
20 supervisor. So I--I'm not positive that Bresson would be
21 liable if he authorized the statement.

22 THE COURT: So take away the context of the, of
23 Nexteer even being involved. You authorized me to go defame
24 somebody if you have authority over me. I guess that's the
25 question. Are you not liable for that?

1 MR. WATSON: Well, all I can do is repeat myself
2 and say when you asked and I thought so. But I'm not
3 positive what the law says in that regard.

4 THE COURT: I think we all tend to think so. Well
5 that's why I left the issue and now we're re-raising it.

6 MR. WATSON: Well, Judge, they're filing an amended
7 complaint and the issue will probably be pretty much off the
8 table. We'll look at their amended complaint and determine
9 whether or not we want to bring a motion again.

10 THE COURT: Okay. Anything else?

11 MR. WATSON: No.

12 THE COURT: And I didn't know, I don't know if I
13 asked Mr. Shea, anything else?

14 MR. SHEA: No, Your Honor.

15 THE COURT: Mr. Tarrant.

16 MR. TARRANT: No, Your Honor.

17 THE COURT: If there's nothing else that will
18 conclude the proceeding. I do want to comment, I'm sorry,
19 seeing Mr. Baran's face.

20 Earlier I made an allusion to what I recall to be
21 in a conversation with counsel. And I could tell by the deer
22 and the headlights look that no one else remembered it. And
23 if it's very possible I didn't make it to this group of
24 attorneys. I have another case that has an international
25 flavor that could very well have prompted the discussion

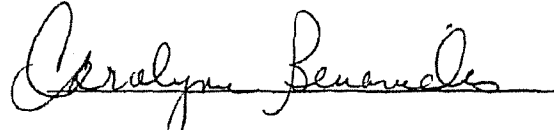
1 about carrying bags for counsel into Europe. So that one
2 I'll--I'll take away as a faulty memory on which case. I just
3 want to clarify in case anyone thought that I was suggesting
4 that you didn't remember something that happened in fact; it
5 may have happened but not with this group of attorneys. On
6 the other hand, the case management order is a fact. Thank
7 you.

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10 (At 3:34 p.m., proceeding concluded)
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I certify that this transcript, consisting of 132 pages, is a complete, true, and correct transcript, of the Motion to Dismiss Counterclaim and Motion for Leave to Amend Complaint proceedings and testimony taken in this case on Tuesday, June 3, 2014.



CAROLYNN BENAVIDES CER 8145
 Certified Electronic Recorder
 111 S. Michigan Avenue
 Saginaw, MI 48602
 (989) 790-5365

Dated: August 26, 2014

EXHIBIT B

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT	CASE MANAGEMENT ORDER	FILE NO. 13-21401-CK
---------------------------------------------------------------------	------------------------------	---------------------------------------

Plaintiff(s) Nexteer Automotive	v	Defendant(s) Mando America Corp, and several individual defendants
Attorney(s) name, bar no., address, telephone, and email Richard W. Warren (P63123) Jerome R. Watson (P27082)		Attorney(s) name, bar no., address, telephone, and email Andrew T. Baran (P31567) David J. Shea (P41399) C. Patrick Kaitenbach (P15666)

The court having conducted a case management conference with each party/attorney; and the court being preliminarily advised of the following:

Primary Claim(s): breach of employment/confidentiality agreement and/or nonsolicitation agreement, and misappropriation of trade secrets (together with other claims)

Relief Requested: (A) an injunction enjoining defendants from (i) using or disclosing plaintiff's confidential/proprietary information and/or trade secrets, and (ii) soliciting plaintiff's employees, and (B) money damages

Primary Defense(s): defendants have not breached any duty

Admissions / Stipulations (facts and/or documents): nothing at this time

IT IS ORDERED:

Jurisdiction / Venue

- Personal Jurisdiction/Process/Service.** Jurisdiction over the person or property, and sufficiency of process / service is ☒ undisputed ☐ disputed by timely motion/pleading [MCR 2.116(C)(1), (2), and (3), and (D)(1)]
- Venue.** Venue is ☒ undisputed ☐ disputed by timely motion [MCR 2.221 et seq.]

Parties / Claims / Pleadings

- Real Party In Interest/Capacity** [MCR 2.201]: ☒ non-issue ☐ issue:
- Joinder of Claims/Counterclaims/Cross-Claims** [MCR 2.203]: ☐ non-issue ☒ issue: defendants may file counterclaim by 12-20-13.
- Third-Parties** [MCR 2.204]: ☐ non-issue ☒ issue: defendants may file third-party complaint by 12-20-13
- Joinder of Parties** [MCR 2.205, 2.206, 2.207]: ☒ non-issue ☐ issue:
- Affirmative Defenses** [MCR 2.111(F)(3)]: ☒ non-issue (not yet due) ☐ issue:
- Pleadings Amendment** [MCR 2.118]: ☐ not necessary ☒ plaintiff is granted leave to file/serve amended complaint by 12-06-13. After that date, pleadings may be amended only by leave of the court upon written motion and hearing or by written consent of the adverse party. If complaint is amended, defendants have until 12-20-13 to answer, otherwise answer due by 12-06-13. [MCR 2.118(A)(2), MCR 2.401(B)(2)(a)(ii)]
- Related Case Consolidation** [MCR 2.505]: ☒ non-issue ☐ issue:

DEC 04 2013

Discovery

10. **Witness Lists.** Within - TBD - days following the date of this order, the parties shall file and serve witness lists in accordance with MCR 2.401(I)(1) [MCR 2.401(B)(2)(a)(iv)]; and witnesses not presently known shall be listed within 14 days following their discovery. Witnesses not listed in accordance with this order are prohibited from testifying at trial except upon good cause shown. [MCR 2.401(I)(2)]
11. **Exhibit Lists.** Within - TBD - days following the date of this order, the parties shall file and serve exhibit lists describing all physical evidence ("Exhibits"); and Exhibits not presently known shall be listed within 14 days following their discovery. Exhibits not listed in accordance with this order shall not be introduced at trial except upon good cause shown.
12. **Formal Discovery** [MCR 2.301 et seq; MCR 2.401(B)(2)(a)(iii)]. Without effecting the parties ability to consent to informal discovery, formal discovery is ☒ permitted by any means provided in MCR subchapter 2.300
 - ☒ limited as follows: Initially, limited to issue of whether 2009 or 2010 agreement controls
 - ☐ to be conducted in conformity with the attached protocol
 - ☐ must be completed by (the "Discovery Deadline")
 - ☒ subject to the following protective order [MCR 2.302(C)]: stipulated order to follow.
 - ☒ suspended until further order of the court, except as noted above to allow discovery of facts related to whether 2009 or 2010 agreement controls
13. **Electronically Stored Information (ESI).** To the extent inconsistent with the prior paragraph, there is a specific protocol for discovery, preservation, and claims of privilege of ESI [MCR 2.401(B)(1)(d) and (2)(c), MCR 2.302(B)(1) and (5)(6)]; unknown at this time.

Motions

14. **Uncontested Motions.** The parties are encouraged to utilize MCR 2.119(D), especially for discovery motions.
15. **Contested Motions.** Contested motions must be filed timely as required by applicable court rule (e.g. MCR 2.221(A), MCR 2.116(D)(1)-(3), MCR 2.203(E)). Motions for summary disposition under MCR 2.116(C)(8) and (9) must be filed no later than 14 days following ☐ the date of this Order ☒ the timely filing of an Answer. Motions for summary disposition under MCR 2.116(C)(10) must be filed no later than 14 days following the Discovery Deadline. Motions not otherwise time-limited must be filed at least 21 days prior to the settlement/trial management conference.

Please contact Judge Jurens' clerk
 (989-790-5366)
 to schedule date and time for all motions

Note: Absent exceptional circumstances, an untimely motion will not be heard by the court.

16. **Adjournments.** Whenever a motion is adjourned by stipulation, the court must be notified. [MCR 2.503]

Arbitration

17. **Arbitration** [MCL 691.1681 et seq., MCR 3.602]: An agreement to arbitrate this controversy ☐ does not exist ☐ is unknown ☒ exists ☐ is/will be the subject of a timely motion ☐ is waived ☒ is not applicable

Alternative Dispute Resolution**18. Alternative Dispute Resolution (ADR) [MCR 2.410]:**

- ☐ This case is referred to neutral expert evaluation in accordance with the attached Order for Neutral Expert Evaluation.
- ☐ This case is referred to facilitative mediation (MCR 2.411) in accordance with the attached Order for Mediation.
- ☐ This case shall be submitted to case evaluation (MCR 2.403) following expiration of the Discovery Deadline.
- ☒ This case is not presently being submitted to any form of ADR, but may be subsequently.

Further Conferences**19. Status Conferences.** The court may schedule one or more status conferences, and attending attorneys must be thoroughly familiar with the case. The next scheduled status conference is **12:00 noon on 12-20-13.**

Attorneys may attend these conferences in person or by telephone (notwithstanding the standard notice which otherwise requires personal appearance). Attorneys desiring to attend by telephone should contact each attorney of record in advance of the conference date to determine if they also want to attend by telephone. In any event, the participating attorney(s) is/are solely responsible for arranging, initiating, and paying for any conference/telephone call to the court. The court's telephone number is (989) 790-5366.

20. Attorneys' Initiative. Attorneys who wish court input on any matter in the case (e.g., scheduling, discovery disputes, etc.), may contact the judge's clerk (989-790-5366) to request a conference be scheduled. Unless otherwise directed, the rules applicable to attendance at status conferences similarly apply to these conferences.**21. Settlement/Trial Management Conference.** A settlement/trial management conference will be held ☒ prior to trial (date/time to be provided separately) ☐ on

The attorneys attending this conference shall be thoroughly familiar with the case and have the authority necessary to fully participate in the conference; and, unless expressly excused by the court, the attorneys who intend to try the case must attend the conference.

In addition to attorneys of record, each party (or a representative if the party is not an individual) must be present at the conference or be immediately available at the time of the conference, and have information and authority adequate for reasonable and effective participation in the conference for all purposes, including settlement.

Trial**22. Trial Date.** If this case is not otherwise resolved, ☐ trial will commence on _____ ☒ a trial date will be set by the court (date/time to be provided separately); and, in any event, will continue from day to day until completed.

☐ A preliminary injunction having been granted, trial on the merits must be held within 6 months after the injunction is granted, unless good cause is shown or the parties stipulate to a longer period. [MCR 3.310(A)(5)]

Trials may not be adjourned by stipulation. A motion must be filed to obtain any adjournment, and all such motions must strictly comply with MCR 2.503(B) and (C)(1). Motions to adjourn trial will rarely be granted.

23. Trial Type [MCR 2.508, 2.509]: ☐ a timely demand for trial by jury has been filed (subject to the court finding that there is no right to trial by jury of some or all issues) ☐ the parties agree that all issues are to be tried by the court ☒ the time for demanding trial by jury has not yet expired (i.e. within 28 days after filing of answer or timely reply)

[Note: Failure to timely file a demand or pay the jury fee waives trial by jury, MCR 2.508(B)(D)]


Other

24. Settlement Possibilities (In whole or part). Not at this time

25.

26.

Date: 11-25-73


M. Randall Jurens
(P27637)
M. Randall Jurens, Circuit Court Judge (P27637)

I certify that on this date a copy of this order was served on each attorney of record.

Dated: 12-2-73


Susan R. Jordan

MCR 2.401

EXHIBIT C

2016 WL 67196

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.Court of Appeals of Texas,
Houston (1st Dist.).

Ifeolumpio O. Sofola M.D., Appellant

v.

Aetna Health, Inc. and Aetna Life
Insurance Company, Appellees

NO. 01-15-00387-CV

|

Opinion issued January 5, 2016

Synopsis**Background:** Health care provider sued physician asserting equitable claims. Physician moved to compel arbitration. The 152nd District Court, Harris County, found that he had waived his right to arbitration. Physician appealed.**Holdings:** The Court of Appeals, Harvey Brown, J., held that:

[1] physician did not expressly waive his contractual right to arbitrate, and

[2] he did not impliedly waive his contractual right to arbitrate.

Reversed and remanded.

West Headnotes (3)

[1] Alternative Dispute Resolution

Suing or participating in suit

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and
Contest25Tk177 Right to Enforcement and Defenses in
General

25Tk182 Waiver or Estoppel

25Tk182(2) Suing or participating in suit

Physician did not expressly waive his contractual right to arbitrate breach of contract and fraud claims brought against him by health care provider by removing his arbitration motion during course of agreed motion concerning docket control dates; statement in pleading that physician "intended to withdraw" his motion to compel arbitration followed the representation that the provider had agreed to arbitrate.

Cases that cite this headnote

[2] Alternative Dispute Resolution

Suing or participating in suit

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and
Contest25Tk177 Right to Enforcement and Defenses in
General

25Tk182 Waiver or Estoppel

25Tk182(2) Suing or participating in suit

Physician did not substantially invoke the litigation process in contravention of his arbitration rights set forth in its contract with health care provider, as would support a conclusion that physician impliedly waived his arbitration rights in contract dispute, even though physician challenged initial equitable claims through a plea to the jurisdiction and also filed a motion for summary judgment; provider had expressly stated that it was presenting equitable claims in an effort to plead around the contractual arbitration provision, and physician had argued that the claims were actually breach of contract claims.

Cases that cite this headnote

[3] Alternative Dispute Resolution

Suing or participating in suit

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and
Contest25Tk177 Right to Enforcement and Defenses in
General

25Tk182 Waiver or Estoppel

25Tk182(2) Suing or participating in suit

Health care provider did not prove it suffered unfair prejudice as a result of physician's litigation conduct in contract dispute, as would support conclusion that physician impliedly waived his contractual right to arbitrate; after initiating its lawsuit, provider spent a year attempting to plead around the arbitration agreement, and when it finally submitted arbitrable claims, physician demanded arbitration within two months.

Cases that cite this headnote

On Appeal from the 152nd District Court, Harris County, Texas, Trial Court Case No. 2013-76814

Attorneys and Law Firms

William L. Van Fleet II, for Ifeolumpio O. Sofola M.D.

John Bruce Shely, Cameron P. Pope, for Aetna Health, Inc. and Aetna Life Insurance Company.

Panel consists of Justices Jennings, Higley, and Brown.

MEMORANDUM OPINION

Harvey Brown, Justice

*1 This is an interlocutory appeal of an order denying arbitration.¹ Dr. Ifeolumipo Sofola moved to compel arbitration of claims filed against him by two Aetna entities for breach of contract and fraud. The trial court found that Dr. Sofola waived his right to arbitration. Dr. Sofola appeals the trial court's order, arguing that he neither expressly nor impliedly waived his right to arbitrate.

¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West 2013) (permitting interlocutory appeal of order denying arbitration).

We reverse.

Background

A. The contractual relationship

Aetna Health, Inc. and Dr. Sofola entered into a Specialist Physician Agreement in March 2009 for Dr. Sofola to become a participating provider of health care services to Aetna's members. The agreement details the parties' various obligations to each other. It contains an arbitration provision that "[a]ny controversy or claim arising out of or relating to this Agreement including breach, termination, or validity of this Agreement, except for temporary, preliminary, or permanent injunctive relief or any other form of equitable relief, shall be settled by binding arbitration."

Another provision of the agreement requires the parties to limit the scope of the arbitration proceeding to claims between themselves and no other parties. It states that "[a]ny arbitration or other proceeding related to a dispute arising under this Agreement shall be conducted solely between them. Neither Party shall request, nor consent to any request, that their dispute be joined or consolidated for any purpose ... with any other proceeding between such Party and any third party."

The agreement also has a specific provision regarding the type of damages that may be sought. Section 9.4 states that "either Party's liability, if any, for damages to the other Party for any cause whatsoever arising out of or related to this Agreement, and regardless of the form of the action, shall be limited to the damaged Party's actual damages." This provision applies regardless of the theory asserted: "Neither Party shall be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever sustained as a result of a breach of this Agreement or any action, inaction, alleged tortious conduct, or delay by the other Party."

B. Aetna sues Dr. Sofola

A couple of years into the contractual relationship, Aetna claimed that Dr. Sofola and other physicians were breaching their agreements and collecting more than their agreed amount of professional fees through a scheme to draw Aetna members to an out-of-network facility in which they held an ownership interest. According to Aetna, the physicians told their Aetna patients that the out-of-network facility would treat them as in-network patients. This led the patients to agree to receive services at the out-of-network facility. In return, the facility greatly reduced or eliminated the members' copays, removing any financial incentive the patients had to stay in-network.

*2 According to Aetna, the physicians established shell practice entities and entered into secret agreements to receive

kickbacks from the out-of-network facility for the referrals. Because Aetna was paying higher facility fees at the out-of-network facility, the arrangement damaged Aetna. Aetna asserts that, to the extent some of the higher facility fees were being funneled to the referring physicians, the conduct violated the provider agreements.

In 2011, Aetna sued Dr. Sofola. The suit was later dismissed. Aetna refiled its suit in late 2013. That petition asserted only equitable claims. Dr. Sofola filed a single responsive pleading in January 2014. The pleading included an answer, plea to the jurisdiction, and special exceptions. He argued that the provider agreement contained a mandatory arbitration provision and that Aetna was impermissibly attempting to plead around that arbitration agreement. He contended that the suit should be dismissed because Aetna did not have standing to assert its “equitable” claims. Dr. Sofola again argued that Aetna was improperly attempting to plead around the arbitration provision in a reply filed in March 2014.

The trial court partially granted Dr. Sofola's plea and dismissed all claims except Aetna's equitable accounting claim. At that point—in March 2014—the equitable accounting claim was the only claim pending against Dr. Sofola, and he had no express contractual right to arbitrate that claim.

In late October 2014, Dr. Sofola filed a motion for summary judgment on the one remaining claim. He argued that an equitable accounting was not available to Aetna because Aetna had an adequate remedy at law through arbitration:

Aetna has an adequate remedy at law, but it is one that Aetna does not like. Aetna may assert a breach of contract claim to recover any damages it claims to have suffered as a result of alleged breaches of its contracts with ... Dr. Sofola. But Aetna does not want to pursue its breach of contract claims because they are subject to mandatory *confidential* arbitration.... The fact that Aetna does not like its remedy at law cannot and does not erase the fact that one exists, and Aetna cannot demand an equitable accounting just because it does not like the forum for its adequate remedy at law.

Two weeks later, in November 2014, Aetna amended its petition for the first time. The amended petition asserted claims against multiple defendants, not just Dr. Sofola. It asserted various contractual, injunctive, and tort causes of action, in addition to the equitable accounting claim. It sought exemplary damages, not just equitable relief. The first amended petition also informed the trial court that “[i]t is possible that the Doctors and Aetna may agree that some of their dispute will be conducted in a private arbitration.”

C. Dr. Sofola moves to compel arbitration

In January 2015—two months after Aetna amended its petition to assert nonequitable claims—Dr. Sofola and his co-defendants filed a motion seeking “dismissal for mandatory arbitration.” Dr. Sofola argued that “Aetna's claims are subject to arbitration provisions” but it was pursuing litigation “to intimidate physicians around the nation and prevent them from referring patients to out of network providers.” He requested that the trial court dismiss Aetna's claims pursuant to the “undisputed,” mandatory arbitration provision. In support, he quoted Aetna's statements made at an earlier hearing, which he viewed as admitting that Aetna's non-equitable claims were subject to mandatory arbitration:

*3 Well, we are allowed to plead around the arbitration provision. The arbitration provision gives us an equitable carve out and that's exactly what we are doing. We are trying to plead within that equitable claim.

Dr. Sofola's arbitration motion was scheduled for hearing on January 23, 2015. Several events occurred before that hearing date.

D. Surrounding events that occurred before hearing on motion

Dr. Sofola filed his motion to dismiss on January 6. Before Aetna responded, it twice sought to amend the docket control dates. The first motion was filed January 9 and sought to extend expert designation deadlines because Aetna had not received notice of the deadlines. Dr. Sofola agreed to the relief Aetna sought: new expert deadlines. The second motion was filed just three days later. It sought to extend other case deadlines for the same reason. Again, Dr. Sofola did not oppose the relief sought.

Aetna filed its response to Dr. Sofola's motion to dismiss on January 21, stating that "Aetna has voluntarily agreed to arbitrate its claims against ... Sofola, [and] arbitration of those claims should be ordered."

The motion was set to be heard on February 20. Three days before the hearing date, on February 17, Dr. Sofola filed a pleading withdrawing the motion. According to that pleading, the withdrawal was "without prejudice" and Dr. Sofola "reserve[d] the right to re-file a Motion to Dismiss in the future, if necessary."

On February 19, Aetna filed another agreed motion to extend deadlines. Aetna's counsel confirmed at oral argument that Aetna prepared the motion and signed it for Dr. Sofola by permission. The pleading noted that the case was one month out from trial, reiterated that Aetna had not received notice of

some deadlines in the past, and requested that the trial date be extended

The pleading recounted that Dr. Sofola had moved to compel arbitration, Aetna had "agree[d] to arbitrate its claims," and the motion had been reset "while the Parties attempted to agree on submitting the claims to arbitration."

In addition, the pleading referenced that, three days earlier, on February 16, Dr. Sofola and his co-defendants had "notified Aetna that [they] intended to withdraw their motion and would no longer request that the court compel arbitration."

Finally, the motion confirmed that the parties were not requesting new dates to cause delay.

To summarize the events thus far:

January 6	Dr. Sofola moved to dismiss suit because of the mandatory arbitration provision
January 21	Aetna stated that it has agreed to arbitrate "all of its claims against ... Sofola" but contended that claims against other defendants should continue
February 17	Dr. Sofola withdrew "without prejudice" his motion seeking to dismiss the suit for mandatory arbitration
February 19	In the context of requesting new docket control dates, Aetna acknowledged that it had agreed to arbitrate and that Dr. Sofola withdrew the motion and would no longer request that the Court "compel" arbitration
February 20	Date motion would have been heard if it had not been withdrawn

One week after the new dates were entered, Dr. Sofola filed a counterclaim "subject to the express arbitration provision and request for arbitration pending before this court." In his counterclaim—his third pleading referencing a request for arbitration—Dr. Sofola stated as follows:

*4 Dr. Sofola's counterclaim is expressly filed subject to the arbitration agreement between the parties. Dr. Sofola insists that all matters pending in this litigation, including this counterclaim, are to be arbitrated.... [Dr. Sofola] insists that

the case is being wrongly prosecuted in court and asks that the suit be dismissed and referred to arbitration in its entirety."

Three days later, Dr. Sofola filed a motion for contractual severance of claims and arbitration. Within the next ten days, Dr. Sofola filed three more pleadings either supplementing evidentiary support for the relief sought or making corrections to the pending motion for arbitration. After these filings, Dr. Sofola had pleaded a right to arbitration in at least seven pleadings.

E. Aetna responds to the motion by arguing waiver

On March 26—the same day that Dr. Sofola filed his last amendment to the arbitration motion—Aetna filed its response. Despite its earlier agreements to arbitrate, Aetna now challenged arbitration, contending that Dr. Sofola had waived his right to arbitration. Specifically, Aetna contended that Dr. Sofola's February 17 notice of withdrawal of his motion to dismiss acted as a judicial admission and estopped him from later seeking arbitration. The trial court held a non-evidentiary hearing.

In April 2015, which was five months after Aetna first added a claim for legal relief (instead of just equitable relief), the trial court denied Dr. Sofola's motion to compel arbitration. The order did not state the basis for the denial, though the only basis Aetna had raised was waiver. Dr. Sofola timely appealed.

Waiver

We must determine whether Dr. Sofola's actions withdrawing his pending arbitration motion, after he submitted multiple pleadings asserting a contractual right to arbitration and Aetna filed pleadings indicating an agreement to arbitrate, either expressly waived or impliedly waived his right to arbitrate. See *G.T. Leach Builders, LLC v. Sapphire VP., LP*, 458 S.W.3d 502, 511–12 (Tex.2015) (explaining express and implied waivers).

“The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right.” *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex.2008). Waiver must be intentional. *In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex.2007). Waiver may be express or implied. *Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex.2008). If implied from a party's conduct, that conduct must be “unequivocal.” *Id.*; see *Williams Indus., Inc. v. Earth Dev. Sys. Corp.*, 110 S.W.3d 131, 135 (Tex.App.—Houston [1st Dist.] 2003, no pet.); *Haddock v. Quinn*, 287 S.W.3d 158, 177 (Tex.App.—Fort Worth 2009, pet. denied). “Whether waiver occurs depends on the individual facts and circumstances of each case.” *Williams Indus.*, 110 S.W.3d at 135.

A. Standard of review

When the relevant facts are undisputed, whether a party has waived its right to arbitrate is a question of law that we review de novo. *Id.* at 511; see *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex.2014) (per curiam); *Williams Indus.*, 110 S.W.3d at 136 (discussing use of other standards by some courts). “[W]e do not defer to the trial court on questions of law.” *Perry Homes*, 258 S.W.3d at 598.

*5 “There is a strong presumption against waiver of arbitration.” *Perry Homes*, 258 S.W.3d at 584; see *Garcia v. Huerta*, 340 S.W.3d 864, 869 (Tex.App.—San Antonio 2011, pet. denied) (“Once a valid agreement to arbitrate has been established, a presumption attaches favoring arbitration and the burden shifts to the party resisting arbitration to establish a defense to enforcing arbitration.”); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 941 (1983) (discussing United States Arbitration Act and stating that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”); *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 574 (Tex.2014) (per curiam) (listing numerous cases in which the Texas Supreme Court has found no waiver). “[C]ourts should resolve any doubts as to the agreement's scope, waiver, and other issues unrelated to its validity in favor of arbitration.” *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex.2011).

B. Express waiver

Express waiver occurs when a party clearly repudiates or relinquishes its right of arbitration. *G.T. Leach*, 458 S.W.3d at 511 (stating that express waiver occurs through “clear repudiation of the right” to arbitrate). In the context of an arbitration provision, express waiver occurs “when a party affirmatively indicates that it wishes to resolve the case in the judicial forum, rather than through arbitration.” *Okorafor v. Uncle Sam & Assocs., Inc.*, 295 S.W.3d 27, 39 (Tex.App.—Houston [1st Dist.] 2009, pet. denied). “Clear” means “free from doubt” and “sure.” Black's Law Dictionary 287 (9th ed.2009) (defining clear); see *id.* at 1667 (defining “unequivocal” as unambiguous, clear; free from uncertainty); cf. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331, 336, 337 n.8 (Tex.2011) (requiring disclaimer of reliance clause to also be “clear and unequivocal”). The waiver must not only be clear, it must be specific. *Moayed v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 6 (Tex.2014); see *Shumway v. Horizon*

Credit Corp., 801 S.W.2d 890, 893 (Tex.1991) (“a waiver provision must state specifically and separately the rights surrendered.”).

Acts that are merely “inconsistent with an intent to exercise the right to arbitrate” are not sufficient to demonstrate an *express* waiver of the right to arbitrate. *G.T. Leach*, 458 S.W.3d at 511. For example, requesting a new trial date might be inconsistent with exercising a right to arbitration, but that inconsistency does not qualify as an express waiver. *Id.*; see *In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 694 (Tex.2008) (“Nothing in this communication expressly waives arbitration or revokes the arbitration demand Fleetwood included in every answer it filed.”).

[1] Aetna makes two arguments for concluding that Dr. Sofola expressly waived his contractual right to arbitrate. First, it argues that the February 19 agreed motion to extend case deadlines contains an express waiver. Second, it argues that, by placing reservation-of-rights language in his February 17 notice, Dr. Sofola limited his ability to reassert a right to arbitrate to situations in which it became “necessary,” which he has not shown to exist.

1. The February 19 pleading does not contain an express waiver

The February 19 agreed motion requested new docket control dates. Requesting a trial date or seeking new docket control dates does not constitute an express waiver of arbitration rights. *G.T. Leach*, 458 S.W.3d at 511 (holding that, while such actions could be relevant to an implied waiver argument, “they do not constitute an express waiver”). Nonetheless, Aetna argues that Paragraph Three of the motion does qualify as an express waiver. It states as follows:

*6 In the interim, [Dr. Sofola] filed a Motion to Dismiss for Mandatory Arbitration and for Stay. Aetna filed a response, agreeing to arbitrate its claims against doctors. The motion was set for oral hearing on January 23, 2015 and then reset for February 20, 2015, while the Parties attempted to agree on submitting the claims to arbitration. On February 16, 2015, [Dr. Sofola] notified Aetna that [Dr. Sofola] intended to withdraw [his]

motion and would no longer request that the Court compel arbitration.

There are at least three problems with Aetna's argument that Paragraph Three is an express waiver—meaning a clear, unequivocal relinquishment of a right to arbitrate. First, while the agreed motion states that Dr. Sofola “intended to withdraw” his motion and would no longer request the court to “compel” arbitration, that statement of intent follows the representation that Aetna had agreed to arbitrate. Such an agreement presumably would render any further need to compel arbitration unnecessary. Aetna's proposed interpretation of the clause—that Dr. Sofola changed his mind and decided against arbitration²—nevertheless remains plausible. However, because the statement admits of two different but reasonable interpretations, we cannot conclude that Paragraph Three is an express, clear, and unequivocal repudiation of the right to arbitration or an affirmative statement that Dr. Sofola wished to resolve the case in the judicial forum, rather than through arbitration. *G.T. Leach*, 458 S.W.3d at 511 (express waiver occurs “through a clear repudiation of the right” to arbitrate); *Ellis*, 337 S.W.3d at 862 (stating that “any doubts” as to waiver of arbitration right should be resolved “in favor of arbitration”).

² Aetna has argued that statements made by Dr. Sofola or his counsel at the time of these events should be considered. But those statements are not in the record and find no support in the arguments contemporaneously made to the trial court.

Second, neither Paragraph Three nor the remainder of the agreed motion provided a full history of the pleadings relevant to the arbitration issue. Instead, the motion simply explained that there had been “glitches” with the new electronic filing system that caused Aetna to miss deadlines, Dr. Sofola had agreed to extend deadlines as a result,³ and then again, on February 19, Dr. Sofola agreed to extend deadlines once more.⁴ But we should consider the fuller context and the state of the pleadings at that time to determine whether an express waiver occurred. *Cf. Garza v. Villarreal*, 345 S.W.3d 473, 479 (Tex.App.—San Antonio 2011, pet. denied) (court interpreting Rule 11 agreement may consider surrounding circumstances, including state of pleadings, to determine to what parties had agreed).

³ These are the types of agreements that attorneys are encouraged to reach without the necessity of court

intervention. See Texas Lawyer's Creed—A Mandate for Professionalism, III § 6, 15.

- 4 The deadlines set by the trial court in response to the February 19 agreed motion could have been adopted in a subsequent arbitration order. Indeed, Aetna could have been concerned that an arbitrator would retain the dates unaware that “glitches” caused missed deadlines. Thus, it was in Aetna's interest to move the deadlines even if there was a continuing agreement to arbitrate.

The circumstances that were not included with the “glitches” discussion or fully explained in Paragraph Three were (1) that Aetna had twice agreed to arbitrate against Dr. Sofola but did not agree to arbitrate against the other defendants, (2) the complexity surrounding how the parties would divide the litigation between arbitrable claims and parties and those that would remain in litigation,⁵ and (3) that Dr. Sofola was no longer asking the court to “compel” arbitration but all the while reserved his right to demand arbitration if court intervention became “necessary.”⁶

- 5 The court order that resulted from Dr. Sofola's arbitration motion could have addressed more than simply whether the contract claims against Dr. Sofola should be arbitrated. It could have addressed the unarbitrable claims for equitable relief and the claims against third parties, as well as the issue of the recovery of certain types of damages. Thus, an agreement to arbitrate, in this case, was not as simple as two parties agreeing that all claims between them should be arbitrated.

- 6 At the hearing on the waiver issue, none of the parties emphasized Aetna's express agreement to arbitration in two prior pleadings or the context of the earlier withdrawal of the arbitration motion. But these two pleadings and this context support our conclusion that Dr. Sofola did not intentionally or clearly repudiate his right to arbitration, expressly or unequivocally relinquish that right, or affirmatively state that he wished to resolve the case in the judicial forum. See *G.T. Leach*, 458 S.W.3d at 511; *Okorafor*, 295 S.W.3d at 39.

*7 Third, Aetna confirmed at oral argument that it drafted the February 19 document that it now argues is an express waiver by its party-opponent. Given Aetna's role as drafter, an effective waiver would need to be much more straightforward than what we are presented with here. To accept Aetna's reading of the pleadings, we would have to resolve doubt against arbitration and imply a motivation on Dr. Sofola that the surrounding circumstances do not support. Because of the clarity requirement for an express waiver, this we cannot do. See *G.T. Leach*, 458 S.W.3d at 511; *Ellis*, 337 S.W.3d at 862.

Aetna relies on *Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 113 (2d Cir.1987), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), to argue that the act of withdrawing a motion for arbitration waives the right to arbitrate and becomes binding on the pleader such that he cannot later take an inconsistent position in the litigation. But *Gilmore* is distinguishable because the party that previously withdrew its arbitration motion, in that case, agreed that the withdrawal was an express waiver and “conceded” that the effect of the withdrawal was that it could no longer pursue arbitration without a significant, intervening event. *Id.* at 112. Dr. Sofola makes no such concession here. He has steadfastly maintained that he was not waiving his contractual right to arbitrate.

2. The February 17 “if necessary” language does not prohibit dismissal

Because Dr. Sofola's withdrawal motion stated that it was without prejudice and that he reserved the right to reassert his motion “if necessary,” Aetna's second argument hinges on the extent that limitation placed on Dr. Sofola's ability to pursue post-withdrawal arbitration. Aetna argues that this phrase limited Dr. Sofola's opportunity to re-urge his right to arbitration to situations in which arbitration became “absolutely essential,” which Dr. Sofola has not shown to exist.

But there is another, more plausible reading of this language: Dr. Sofola was removing the issue from the court's consideration given that the parties had reached an agreement to arbitrate, but he would re-urge his motion if the parties could not agree on the form of the dismissal order.⁷ Consistent with this interpretation, the parties filed a pleading, just two days later, stating that “Aetna [has] filed a response, agreeing to arbitrate its claims....” Thus, we conclude that Dr. Sofola did not waive his right to arbitration through this February 17 pleading either.

7 See footnote 5, *supra*.

Throughout this case, Dr. Sofola consistently maintained that Aetna was making breach-of-contract claims, that Aetna was attempting to recast them as equitable claims to avoid arbitration, and that he had a contractual right to compel arbitration. Dr. Sofola only removed his arbitration motion from consideration after Aetna agreed in a pleading to arbitrate its claims against Dr. Sofola and the parties informed

the court that they were using the time during which the issue was being passed to “agree” on the terms of the submission to arbitration. We conclude that Dr. Sofola did not expressly waive his right to arbitration during the course of these events. Having rejected Aetna's express-waiver argument, we turn to its contention that Dr. Sofola impliedly waived that right.

C. Implied waiver

“A party asserting implied waiver as a defense to arbitration has the burden to prove that (1) the other party has ‘substantially invoked the judicial process,’ which is conduct inconsistent with a claimed right to compel arbitration, and (2) the inconsistent conduct has caused it to suffer detriment or prejudice.” *G.T. Leach*, 458 S.W.3d at 511–12; *Perry Homes*, 258 S.W.3d at 593–94. Prejudice is “inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.” *Perry Homes*, 258 S.W.3d at 597; *Kennedy Hodges*, 433 S.W.3d at 545.

*8 With regard to both prongs of the implied-waiver defense, “this hurdle is a high one” because “the law favors and encourages arbitration.” *G.T. Leach*, 458 S.W.3d at 512 (quoting *Perry Homes*, 258 S.W.3d at 589–90); see *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 575 (Tex.2014) (per curiam). The party asserting implied waiver bears a “heavy burden of proof,” and the court must resolve all doubts in favor of arbitration. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 705 (Tex.1998); *USX Corp. v. West*, 759 S.W.2d 764, 767 (Tex.App.–Houston [1st Dist.] 1988, no writ).

Implied waiver is decided on a case-by-case basis by assessing the “totality of the circumstances.” *Kennedy Hodges*, 433 S.W.3d at 545. We consider such factors as (1) how long the party moving to compel arbitration waited to do so; (2) the reasons for the movant's delay; (3) whether and when the movant knew of the arbitration agreement during the period of delay; (4) how much discovery the movant conducted before moving to compel arbitration and whether that discovery related to the merits; (5) whether the movant requested the court to dispose of claims on the merits; (6) whether the movant asserted affirmative claims for relief in court; (7) the extent of the movant's engagement in pretrial matters related to the merits (as opposed to matters related to arbitrability or jurisdiction); (8) the amount of time and expense the parties have committed to the litigation; (9) whether the discovery conducted would be unavailable or

useful in arbitration; (10) whether activity in court would be duplicated in arbitration; and (11) when the case was to be tried. *G.T. Leach*, 458 S.W.3d at 512; *Perry Homes*, 258 S.W.3d at 590–91; *Kennedy Hodges*, 433 S.W.3d at 545.

1. Substantially invoking judicial process

[2] Aetna argues that Dr. Sofola took actions during the pendency of the litigation that substantially invoked the judicial process. The first act on which Aetna relies is Dr. Sofola's decision to challenge Aetna's equitable claims through a plea to the jurisdiction instead of a motion to compel arbitration. Aetna's original petition asserted equitable claims only. Aetna expressly stated that it was presenting equitable claims in an effort to plead around the contractual arbitration provision. Dr. Sofola argued that the claims were actually breach of contract claims. His plea to the jurisdiction based on arguments consistent with the arbitration provision effectively challenged those claims and resulted in all but one being dismissed. We do not agree that Dr. Sofola substantially invoked the judicial process by asserting a plea to the jurisdiction.

Next, Aetna cites Dr. Sofola's summary-judgment motion and counterclaim. Dr. Sofola moved for summary judgment on the only Aetna claim that survived the plea to the jurisdiction. In that pleading, Dr. Sofola again asserted that Aetna's true claim was a breach-of-contract claim and that Aetna was seeking an equitable accounting only to avoid the confidential arbitration provision that applied. Dr. Sofola's subsequent counterclaim was filed “expressly and unconditionally subject to and insisting upon compliance with the arbitration provision between the parties.” The title of the pleading stated that it was “filed subject to the express arbitration provision and request for arbitration pending before this court.” We do not view either of these pleadings as substantially invoking the judicial process.

*9 Next, Aetna argues that Dr. Sofola's notice of withdrawal of his arbitration motion acted as a waiver. We have already concluded that the notice, when considered in the context of the parties' other pleadings and in light of the surrounding circumstances, equally could be viewed as passing the hearing because the parties had agreed to arbitrate. Because the record does not support the conclusion that Dr. Sofola withdrew his motion to elect litigation and in light of the strong presumption against waiver of the right to arbitrate, we conclude that the withdrawal does not represent a substantial invocation of the judicial process. See *Williams Indus.*, 110 S.W.3d at 135.

Finally, both times that Dr. Sofola executed agreed motions to extend deadlines, those documents plainly stated that the requests were being made because Aetna had been disadvantaged by missing deadlines. Dr. Sofola acquiesced to Aetna's request for new deadlines. Doing so does not equate to a deliberate act inconsistent with the right to arbitrate. *See id.*

2. Evidence of prejudice

[3] To show prejudice through delay, Aetna focuses on the fact that Dr. Sofola first moved to compel arbitration “13 months after suit was filed by Aetna.” At the hearing on the motion to compel arbitration, Aetna argued, “if Dr. Sofola wanted to go to arbitration, he should have filed that Motion Day One. He should have been in arbitration from Day One and avoiding all of this unnecessary expense in this case.” But during the first 11 months of the lawsuit, Aetna sought only equitable relief—which was not subject to arbitration—specifically noting that it was exercising its right to plead within the “equitable carve out” that the arbitration provision provided. The time period during which Aetna was asserting only equitable claims does not count against Dr. Sofola as a period of delay in seeking arbitration.

Removing those eleven months from our analysis, we see that Aetna first asserted its non-equitable claims in November 2014. Dr. Sofola moved for dismissal, specifically citing the arbitration clause, two months later. This is not a lengthy delay. Regardless, “while the time period may be instructive in interpreting the parties' intentions, it alone is not the standard by which courts determine” whether a waiver has occurred. *In re Universal Underwriters*, 345 S.W.3d 404, 408 (Tex.2011). Instead, a court must examine “the circumstances and the parties' conduct, not merely a measure of the amount of time involved” preceding the alleged waiver. *Id.* Because the parties, through their pleadings, were seemingly agreeing to arbitrate but continuing to negotiate aspects of that agreement, a two month delay does not appear unreasonable.

Finally, Aetna argues that the “time and expense that Aetna has incurred because of Sofola's actions is obvious from the fact of the record.” However, the timeline of events does not support that contention. Aetna presents no evidence that Dr. Sofola engaged in any discovery or otherwise affirmatively sought relief in the judicial forum during the period before he sought to compel arbitration. Nor does Aetna present any evidence that it spent much time or money on the merits of its arbitrable claims.

After initiating its lawsuit, Aetna spent much of the next year attempting to plead around the arbitration agreement. When Aetna finally clearly asserted arbitrable claims, Dr. Sofola demanded arbitration within two months and was denied that right within four. In light of the significant amount of time Aetna spent defending its “carve out” pleading approach and Dr. Sofola spent demanding or preserving his contractual right to arbitrate, we do not view the record as supporting Aetna's contention that it endured expense and delay as a result of Dr. Sofola's flip-flop tactics versus its own trial strategy. The record does not support Aetna's statement to the contrary.

*10 In sum, Aetna's petition seeking legal relief subject to the arbitration clause (not just equitable relief) had been on file only four and one-half months when the trial court rejected Dr. Sofola's arbitration motion based on Aetna's waiver defense. During that time, Dr. Sofola filed at least five pleadings asserting a right to arbitration, and Aetna filed at least two pleadings evidencing an agreement to arbitration. We conclude that Aetna has not established the requirements for holding that Dr. Sofola impliedly waived his right to arbitration during these events.

Conclusion

Because Dr. Sofola neither expressly nor impliedly waived his right to arbitration, we conclude that the trial court erred by denying his motion. We reach this conclusion by considering the language in the agreed motion on which Aetna bases its waiver argument—language that was drafted by Aetna—as well as the surrounding circumstances and pleadings, including Aetna's two statements that it was agreeing to arbitrate and that the hearing that was approaching when those statements were made.

Aetna offered no basis for denying Dr. Sofola's motion other than waiver; therefore, having concluded that the waiver argument was without merit, we reverse the trial court's order denying the motion and instruct the trial court to grant the motion as to all non-equitable claims.

All Citations

Not Reported in S.W.3d, 2016 WL 67196

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EXHIBIT D

1997 WL 45041

Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

UNITED STATES FIRE
INSURANCE COMPANY, Plaintiff,
v.

Lynn Cutler WALSH, Administratrix, of The
Estate of James Walsh, Deceased, Defendant.

No. CIV. A. 96-CV-8409.

|
Jan. 30, 1997.

MEMORANDUM

BUCKWALTER, J.

I. INTRODUCTION

*1 Plaintiff United States Fire Insurance Company ("Plaintiff") has brought this action for declaratory relief against Defendant Lynn Cutler Walsh, Administratrix of the Estate of James Walsh ("Defendant"). In the Complaint, plaintiff is seeking a determination by the Court that it is not obligated to provide uninsured motorist benefits to or on behalf of defendant in connection with fatal injuries the deceased James Walsh sustained in a motor vehicle accident.

Presently before the Court for disposition are defendant's Motion to Dismiss and plaintiff's response thereto. For the following reasons, defendant's motion will be granted.

II. ARGUMENT

In its response to the Motion to Dismiss, plaintiff argues that defendant waived her right to arbitration. In particular, plaintiff alleges that defendant agreed "to the resolution of the coverage issues involved in the claim for underinsured motorist benefits in Court by way of a declaratory judgment action." Defendant counters the she "has at all relevant times been under the impression that the counsel for the United State Fire Insurance Company intended to file a declaratory judgment action before a competent panel of arbitrators as is called for in ... [the] contract of insurance...." I conclude that defendant has not waived her right to arbitration.¹

1 In its reply to the Motion to Dismiss, Plaintiff states that "[t]he policy of insurance does, in fact, provide for arbitration...." In light of this comment, the Court will assume that the parties agree that an arbitration panel has the proper authority to decide this coverage dispute.

As a matter of public policy, our courts favor the settlement of disputes by arbitration. *Goral v. Fox Ridge, Inc.*, 683 A.2d 931, 933 (Pa.Super.Ct.1996). Nevertheless, the right to enforce an arbitration clause can be waived. *Id.* A waiver of the right to proceed to arbitration may be expressly stated, or it may be inferred from a "party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary. *Id.* (citing *Samuel J. Marranca Gen. Contracting Co., Inc. v. Amerimar Cherry Hill Assoc. Ltd. Partnership*, 416 Pa.Super. 45, 610 A.2d 499, 501 (Pa.Super.Ct.1992). Waiver "should not be lightly inferred[,] unless one's conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished that right. *Id.* (citing *Kwalick v. Bosacco*, 329 Pa.Super. 235, 478 A.2d 50, 52 (Pa.Super.Ct.1984).

In the instant case, there simply is no undisputed evidence to support the claim that defendant expressly waived her right to arbitration. Neither has plaintiff demonstrated that defendant's acts or language are inconsistent with defendant's goal of resolving the coverage dispute through arbitration. Therefore, in light of the public policy concerns discussed above, the defendant's motion will be granted.

An order follows.

ORDER

AND NOW, this 30th day of January, 1997, upon consideration of defendant's Motion to Dismiss the Complaint (Docket No. 2) and plaintiff's response thereto (Docket No. 4), it is hereby ORDERED and DECREED that said Motion is GRANTED, and plaintiff's action for declaratory relief is DISMISSED.

All Citations

Not Reported in F.Supp., 1997 WL 45041

EXHIBIT E

2004 WL 1375557

Only the Westlaw citation is currently available.
 United States District Court,
 S.D. New York.

THE APOLLO THEATER
 FOUNDATION, INC., Plaintiff,
 v.

WESTERN INTERNATIONAL SYNDICATION
 and Inner City Theater Group, Inc., Defendants.

No. 02 Civ. 10037(DLC).

June 21, 2004.

Attorneys and Law Firms

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 Syndication.

OPINION AND ORDER

COTE, J.

*1 Apollo Theater Foundation, Inc. ("Apollo") filed this action on December 19, 2002, alleging that the production and distribution of an urban-oriented variety show entitled "Showtime in Harlem" or "Showtime" by Western International Syndication ("Western") and Inner City Theater Group ("ICTG") (collectively, "Defendants") infringed Apollo's rights in the federally-registered trademark IT'S SHOWTIME AT THE APOLLO. The present motion by Western to dismiss or stay Apollo's claims in favor of arbitration was filed on January 20, 2004. Western previously represented to this Court that it wished for all of the claims in this action to be resolved in litigation. For the reasons that follow, Western's motion to dismiss or stay is denied.

Background

On March 7, 2003, Western answered the complaint in this action and filed a counterclaim for declaratory judgment alleging, *inter alia*, that it obtained certain rights to the use of the trademark APOLLO under a 1998 license agreement.¹ Western's answer did not include an affirmative defense of arbitrability. At an initial pre-trial conference on March 14, discovery and motion practice were scheduled. On March 21, Apollo moved to dismiss or stay Defendants' counterclaims pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–14, (the "Apollo Motion") on the ground that the counterclaims require the interpretation of three agreements containing binding arbitration clauses: a 1992 Asset Purchase Agreement between Apollo and ICTG's predecessor ("1992 Agreement"); the 1998 license agreement between Apollo, ICTG and Western; and a 1999 renewal license agreement between the same parties.

¹ Defendant ICTG filed its answer on March 6, 2003. ICTG agreed on December 7, 2003, to enter into a proposed stipulation with Apollo to resolve this action by arbitration. ICTG does not join Western in bringing this motion.

Western opposed the Apollo Motion, arguing primarily that Apollo waived its right to pursue arbitration when it sought to litigate its own arbitrable claims. Western represented that it "would gladly keep the parties' disputes before this Court, and did not seek to have Plaintiff's claims dismissed in favor of arbitration at the outset of this case." In the alternative, Western moved to dismiss Apollo's claims in favor of arbitration (the "Alternative Motion"), but emphasized that "Western's primary contention ... is that Plaintiff waived its right to compel arbitration by asserting its claims in this Court in the first instance, and *none* of the parties' claims should be dismissed. Western asks the Court to dismiss Plaintiff's claims only if the Court rejects Western's waiver argument." (Emphasis in original.)

While the Apollo Motion was pending, the parties proceeded with fact discovery,² which was to be completed by September 5. As of August 1, the parties had produced approximately 12,000 pages of documents—of which over 9,000 were produced by Apollo. Several third parties had also been subpoenaed and produced related documents. In addition, the parties engaged in a series of settlement negotiations under the supervision of Magistrate Judge Michael Dolinger. As a result of discussions with Judge Dolinger in May and July, as well as independent negotiations, Western informed Apollo on August 5 that it

was willing to agree in principle to the terms of a proposed settlement. During the month of August, the parties reported on their status weekly to this Court. They were unable to finalize the terms of the settlement and met with Judge Dolinger again in early September.

2 Apollo also brought a motion for a preliminary injunction on May 21, 2003, but withdrew that motion by letter dated July 18, based on Defendants' representation that they did not intend to distribute a program during the 2003–2004 season incorporating the names “Showtime” or “Apollo.”

*2 This Court was thereafter informed that no settlement had been reached at the conference and scheduled a second pretrial conference for September 18. On September 16, the parties reported that the conference would be unnecessary, as significant progress had been made toward settlement. The parties notified the Court at the end of October that they had again failed to finalize the terms of a settlement, and the second pretrial conference was held on November 6. At this conference, Apollo suggested that it would be willing to withdraw its motion to compel arbitration so that the resolution of all claims could proceed exclusively in this Court. Western stated, however, that it now believed all claims should be resolved in arbitration and was therefore unwilling to withdraw its Alternative Motion.

Apollo indicated that it would consent to arbitration provided that the proceedings began within 20 days, the time frame set forth in the 1992 Agreement between Apollo and ICTG, and this Court asked the parties to discuss stipulating to arbitration beginning in January 2004. The parties were instructed that if they were unable to reach a settlement by December 19, 2003, the litigation would proceed and pending motions would be addressed. The parties subsequently met with Judge Dolinger and engaged in additional settlement discussions, focusing principally on the date on which the arbitration would commence. During these discussions Western asserted that it was not a party to the 1992 Agreement and would not agree to arbitration beginning in January. Apollo claims that Western then proposed February 23, 2004 as one potential date to commence arbitration proceedings. Western contends that the February date was one potential date discussed by the parties but argues that Apollo's unwillingness to agree to a date later than February 23 was unreasonable.

Apollo agreed to stipulate to arbitration commencing no later than February 23, 2004, and submitted a proposal to ICTG and Western in December 2003. ICTG agreed to the proposed

stipulation on December 7. In a conference call with the Court on December 9, however, Western stated that it would not stipulate to arbitration beginning on that date.

Apollo withdrew its Arbitration Motion on December 18, 2003. Western did not agree to withdraw its Alternative Motion. A December 30 Order deemed Western's Alternative Motion withdrawn as moot since the factual basis for the motion had changed substantially in the intervening months and Western no longer sought to pursue its argument that Apollo had waived its right to compel arbitration. A new schedule was set during a conference call held on December 30, according to which fact discovery was to be completed by February 27, 2004.³ It was agreed that Western would file a new motion to compel by January 16, 2004. The pending motion was filed on January 20.

3 The Court has granted an extension of time for the completion of non-party discovery, based on the parties' joint representation that they have been unable to obtain essential materials in the possession of third parties, including one that has recently filed for bankruptcy.

Discussion

Under the FAA, written provisions to arbitrate controversies included in any contract affecting interstate commerce “shall be valid, irrevocable, and enforceable, save upon such grounds as exist under law or equity for the revocation of any contract.” 9 U.S.C. § 2. “There is a strong federal policy favoring arbitration as an alternative means of dispute resolution.” *ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 29 (2d Cir.2002) (citation omitted). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *United States Fire Ins. Co. v. National Gypsum Co.*, 101 F.3d 813, 816 (2d Cir.1996).

*3 A party may waive its right to arbitration, however, by expressly indicating that it wishes to resolve its claims before a court. *Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 112 (2d Cir.1987). The withdrawal of a previously-filed motion to compel arbitration of claims raising the same legal and factual issues, for example, may constitute an express waiver. *Id.*; see also *Doctor's Assoc., Inc. v. Distajo*, 107

F.3d 126, 133 (2d Cir.1997). No showing of prejudice to the opposing party is necessary if a litigant has expressly waived its right to arbitration. *Gilmore*, 811 F.2d at 112. Generally, “a party may not freely take inconsistent positions in a law suit and simply ignore the effects of a prior filed document.” *Id.* at 113. This policy against permitting a party to “play fast and loose with the courts” by asserting inconsistent positions concerning its intent to pursue arbitration is necessary to prevent delay and ensure the integrity of the judicial process. *Id.* (citation omitted); see also *Smith v. Petrou*, 705 F.Supp. 183, 185 (S.D.N.Y.1987).

Even absent an express waiver, a party may impliedly waive its right to enforce a contractual arbitration clause by engaging in protracted litigation that prejudices the opposing party. *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir.2000); *PPG Industries, Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 107–08 (2d Cir.1997). In this context, prejudice refers “to the inherent unfairness—in terms of delay, expense, or damage to a party’s legal position—the occurs when the party’s opponent forces it to litigate an issue and later seeks to arbitrate that same issue.” *In re Crysen*, 226 F.3d at 162–63 (citation omitted). There is no bright-line rule for determining when a party has waived its right to arbitration, and a court must conduct a fact-specific inquiry. *Id.* at 163. Factors to be considered include “(1) the time elapsed from the commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice.” *Id.* (citation omitted).

Western expressly waived its right to arbitration by explicitly representing to this Court that it wished to resolve all claims in this forum. In its opposition to the Apollo Motion, Western took the position that Apollo had waived its right to arbitration and that none of the parties’ claims should be dismissed, explicitly stating that it “would gladly keep the parties’ disputes before this Court.” In its reply brief on the Alternative Motion, Western further emphasized that its primary contention was that this litigation should proceed and that Western’s request for arbitration was to be considered only in the event that Apollo was not found to have waived its right to arbitration. Western’s stance against arbitration was explicitly and repeatedly presented to this Court and was no doubt based upon careful evaluation of its legal strategy in this action.

*4 Western’s statement to this Court on November 6, 2003 that it believed all of the claims in this action should be

arbitrated and that it did not consent to proceed with litigation is squarely inconsistent with the position it took in opposition to the Apollo Motion. The fact that Western included an alternative argument requesting arbitration does nothing to eliminate this inconsistency, as Western made clear that it would prefer to resolve its claims before this Court. The Court was notified of Western’s contention that all claims should be subject to arbitration only after Apollo indicated its willingness to agree to Western’s previous request that litigation proceed in this Court. Western may not freely adopt inconsistent positions in this action, delaying the ultimate resolution of Apollo’s claim.

Having found that Western expressly waived its right to arbitration in its opposition to the Apollo Motion, there is no need to reach Apollo’s argument that Western again expressly waived its right to arbitration when it declined to enter into a stipulation to arbitration beginning in either January or February 2004. It is worth noting, however, that after Western changed its position on arbitration from that previously presented to the Court, it had the opportunity to stipulate to arbitration on a time frame discussed by the parties and beginning one month later than that suggested by this Court at the November 6 conference.

It is similarly unnecessary to determine whether Western impliedly waived its right to arbitration given that there is no ambiguity concerning its express waiver. Were an inquiry into an implied waiver by Western required, however, there is ample evidence to support such a finding. Western did not argue that this matter should be resolved in arbitration rather than litigation until almost a full year after the filing of the complaint. It did so, moreover, when Apollo agreed to comply with Western’s previous request that all claims be decided by this Court. During the period before Western reversed its position, the parties engaged in extensive discovery, with Apollo producing over 9,000 documents. The parties met with Magistrate Judge Dolinger on four occasions, reported on their status to this Court throughout the Fall, and engaged in numerous settlement negotiations. Apollo has incurred unnecessary delay and expense in the resolution of its claims as a result of Western’s late and inconsistent assertion that this matter should be resolved through arbitration.

Conclusion

For the reasons stated above, Western’s motion to dismiss or stay Apollo’s claims in favor of arbitration is denied.

All Citations

SO ORDERED:

Not Reported in F.Supp.2d, 2004 WL 1375557

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EXHIBIT F

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation,

Plaintiff,

v.

MANDO AMERICA CORPORATION,
a Michigan corporation, TONY DODAK,
ABRAHAM GEBREGERGIS,
RAMAKRISHNAN RAJAVENKITASUBRAMONY,
CHRISTIAN ROSS, KEVIN ROSS,
TOMY SEBASTIAN, THEODORE G. SEEGER,
TROY STRIETER, JEREMY J. WARMBIER, and
SCOTT WENDLING, jointly and severally,

Defendants,

and

CHRISTIAN ROSS, KEVIN ROSS,
TOMY SEBASTIAN, THEODORE G. SEEGER,
and TONY DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation, LAURENT BRESSON,
and FRANK LUBISCHER,

Counter/Third-Party Defendants.

Case No. 13-021401-CK

Judge: M. Randall Jurens (P27637)

**OPINION AND ORDER
DENYING NEXTEER'S MOTION
FOR RECONSIDERATION OF
ORDER GRANTING MANDO'S
MOTION FOR LEAVE TO FILE
AMENDED ANSWER AND TO
COMPEL ARBITRATION OF
ALL CLAIMS**

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Six months after being summoned to defend this substantial commercial case, Mando requested leave to file an amended answer to assert and compel enforcement of a pre-existing arbitration agreement with Nexteer.

Following oral arguments and extensive briefing, the court issued its Opinion granting Mando's motion on July 10, 2014.

The parties subsequently submitted, and the court signed on August 22, 2014, a Stipulated Order comporting with the court's Opinion.

On September 12, 2014, Nexteer filed a motion for reconsideration under MCR 2.119(F):

- (1) Unless another rule provides a different procedure for reconsideration of a decision (see, e.g. MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion.
- (2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.
- (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Nexteer asserts the court erred in several ways.

Individual Defendants' Contracts Do Not Contain An Arbitration Provision

Nexteer complains that, while the “[t]he crux of this case involves Nexteer’s contractual and common law relationship with [the individual defendants]”¹, the court did not sufficiently consider the lack of an arbitration clause in their employment contracts.

Although discussion of this issue was admittedly limited in the court’s Opinion (p 10), the court did not intend to convey a lack of appreciation for the fact that the individual defendants are not signatories to the NDA. Rather, while fully recognizing that contracts do not generally bind non-signatories, *EEOC v Waffle House, Inc*, 534 US 279, 294 (2002), the court explained inclusion of claims against the individual defendants was warranted under ordinary agency principles. *Javitch v First Union Securities, Inc*, 315 F3d 619, 628-629 (CA 6, 2003).

Court Misled Regarding Availability of Discovery

Nexteer next argues the court should reconsider ordering arbitration because Mando misled the court regarding the availability of discovery in arbitration; specifically, that, “[d]espite Mando’s counsel’s claims during oral arguments that ‘[t]he parties can have depositions’ in [] arbitration, practically speaking, this is rarely the case.”

In fairness, the full text of Mando’s counsel’s statement to the court regarding discovery in arbitration is somewhat more circumspect than Nexteer’s selective quote suggests:

Ms. Wald: There is discovery in arbitration, but the onus is much more on the parties to identify what they want to rely on to prove their claim. So each side goes ahead and identifies what it – what it thinks is the most important and then

¹ With due respect, Nexteer appears to minimize what drove this case into arbitration: (1) its agreement to arbitrate “any dispute, controversy or claim arising out of or in relation to” the June 12, 2012 Non-Disclosure Agreement with Mando (the “NDA”), and (2) its dependence on NDA-related events to plead and support its central claims for threatened misappropriation and tortious interference. *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125 (2002).

you exchange that. Then the arbitrators rule in a pretty kind of fast and dirty way, on, okay, you can each have discovery. The parties can have depositions. Its – it's not that there's no discovery, but it's not the wide ranging discovery that takes place under a kind of general question of is it, [c]ould it possibly bear on your claim? Could it possibly turn up something that one day might be relevant? And I'm not fault[ing] that discovery process, but it can be very expensive, so that's why the interest for my client. (Trans, p 41)

Moreover, further review of the June 3, 2014 hearing transcript discloses representations of the availability of broad discovery in arbitration by counsel for Nexteer:

Mr. Watson: * * * [I]n most arbitrations nowadays, Judge, discovery takes place, a lot of times arbitration take longer than court proceedings and there's just as much discovery. (Trans, p 28)

Mr. Watson: * * * Judge, you go to arbitration, you get the same discovery that you would get if you're in court and a lot of times it takes just as long. (Trans, p 32)

Accordingly, if, in fact, opportunity for discovery in arbitration is “rarely the case”, Mando does not appear to be responsible for any misunderstanding. Moreover, regardless of the existence, source, or content of [mis]information, Nexteer has not demonstrated how a different disposition of Mando's motion must result.

Mando Affirmatively Waived Arbitration

Nexteer also asserts the court erred by not concluding Mando affirmatively waived its right to arbitrate, regardless of the absence of prejudice.

Nexteer's argument is premised on the court's “commentary” during oral argument attempting to work through the effect of counsels' prior consensus, manifested in the court's Case Management Order, that an agreement to arbitrate “exists” but “does not apply”.

While the court remains concerned with the implications of this aspect of the case, Nexteer's motion provides no new argument/theory/precedent to displace the analysis supporting the court's Opinion, including the need to demonstrate prejudice as an element of waiver. *Burns v Olde Discount Corp*, 212 Mich App 576, 582 (1995).

Court Failed to Adequately Address Prejudice

Nexteer also complains that the court failed to adequately address the alleged prejudice resulting from Mando's failure to raise the arbitration agreement at an earlier stage of the litigation; particularly, when the court proceedings resulted in “dismissal of huge portions of Nexteer's claims”.

In fairness, Nexteer's offerings on the subject were fairly limited (see Nexteer's Response to Mando[]'s Motion to Amend Answer and Compel Arbitration, p 9; Nexteer's Supplemental Brief as to Mando[]'s Waiver of Arbitration, pp 3-4; and Trans, p 48).

Nexteer now argues that, having demonstrated acts inconsistent with a known right to arbitrate², the requisite element of prejudice is established by Mando's successful dismissal (in whole or in part) of seven out of nine counts of its complaint, citing *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531 (1985)³, *Madison District Public Schools v Myers*, 247 Mich App 583 (2001)⁴, and *Best v Park West Galleries, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos. 305317 and 308085)⁵.

Of the three cases, *Capital Mortgage* appears to contain the most support for Nexteer's current effort to demonstrate prejudice:

[The defendant] waived its right to arbitration when it filed its motion for summary judgment. A motion for summary judgment indicates an election to proceed other than by arbitration. The rationale for this rule is that summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of res judicata. We find [the defendant's]

² While the court's Opinion focused singularly on Mando's participation in the November 22, 2013 case management conference, and the resulting Case Management Order, it is worth noting that, prior to filing a May 8, 2014 motion to amend answer and compel arbitration, Mando's counsel also, without limitation, filed a December 18, 2013 Motion for Dismissal, participated in a December 20, 2013 status conference, and participated in an April 4, 2014 status conference.

³ In *Capital Mortgage*, the defendant accounting firm was sued by a client for failing to detect and disclose employee embezzlement. The defendant successfully moved to add the client's insurer as a party plaintiff, and then prevailed on the trial court to send the insurer's claims to arbitration pursuant to a pre-existing arbitration agreement.

⁴ In *Madison Public Schools*, at 589-600, the appellate court expressly addressed the element of prejudice, albeit in the context of a plaintiff's belated request for arbitration following the defendant's successful motion for summary disposition on the basis of a release, *MCR 2.117(C)(7)*:

We find that after expending time and resources to defend himself in litigation against plaintiff's complaint, which sought to enforce the settlement agreement according to the parties' alleged intent, and obtaining a dismissal of plaintiff's complaint on its merits, defendant certainly would endure unfair prejudice were he forced to submit to plaintiff's long-delayed demand for arbitration. *Salesin, [v State Farm Fire & Casualty Co*, 229 Mich App 346, 356-357 (1998)] (concluding that the plaintiff would suffer prejudice if the Court vacated the trial court's decision and referred the case to arbitration after the plaintiff expended resources to litigate the merits of the case in the trial court, and this Court, as a result of the defendant's initial refusal to arbitrate). Plaintiff's decision to litigate this matter aggressively for over 1 1/2 years before resorting to arbitration plainly defeats the purpose of arbitration, which is "the final disposition of differences between parties in a faster, less expensive, more expeditious manner than is available in ordinary court proceedings." *Joba [Const Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 179-180 (1986)].

⁵ In *Best*, the appellate court, not confronted by a successful summary disposition motion in the early stages of litigation but, rather, recognizing that the parties expended significant time and resources in the almost 2½ years before defendants asserted an arbitration agreement, concluded, "prejudice would result if the [] defendants [] were allowed to invoke the arbitration clause at this late stage of the litigation".

decision to file a motion for summary judgment before its answer an election not to pursue arbitration. In any event, the act of participating in a lawsuit revoked the arbitration agreement. Accordingly, we find the lower court's decision to compel arbitration to be erroneous and reverse that order. [*Id.* at 536]

Admittedly, by focusing on Nexteer's limited assertion of prejudice -- its unelaborated claim of having invested of "tens of thousands of dollars or more to prepare briefs and motions to be filed in this [case]"⁶ (Nexteer's Supplemental Brief as to Mando's Waiver of Arbitration, p 3-4) -- and not having the benefit of Nexteer's current research, the court's Opinion only minimally addressed Mando's failure to raise the arbitration agreement at an earlier stage of the litigation, and wholly omitted discussing possible prejudice resulting from "dismissal of huge portions of Nexteer's claims". But it does not necessarily follow that this omission constitutes error requiring correction.

As counsel may recall, Mando previously cited *Drexel Burnham Lambert, Inc v Mancino*, 951 F 2d 348, 1991 WL 270809 (CA 6 (Ohio))⁷, and *Hofmeister Family Trust v FGH Industries, LLC*, 2007 WL 2984188 (ED Mich))⁸ (Mando's Brief in Support of Motion to Amend Answer and Compel Arbitration, pp 11-12) to support its position that its delay in invoking the arbitration agreement did not produce the kind of prejudice necessary to establish waiver of its right to arbitrate.

Hofmeister is particularly notable, where, in the course of 10 months of litigation, the defendant filed several motions to dismiss (both for failure to state a claim upon which relief can be granted, *Fed R Civ P 12(b)(6)*, and for lack of genuine dispute as to any material fact, *Fed R Civ P 56*), the federal district court did not find the requisite prejudice:

It appears that Defendants have attempted to minimize the number of counts that need to be litigated in this court or, alternatively, submitted to arbitration, through the use of pretrial motions. * * * Moreover, there is no evidence that the delay involved in Defendants' attempt to narrow the scope of the lawsuit has caused any actual prejudice to Plaintiffs.

Hofmeister, in turn, cites *Microstrategy, Inc v Lauricia*, 268 F3d 244 (CA 4, 2001)⁹, a case distinguished by "remarkably aggressive" litigation strategy in the six months prior to

⁶ Nexteer never explained the nature or purpose of spending "tens of thousands of dollars or more to prepare briefs and motions to be filed in this [case]" (i.e. apparently prospective, never filed, pleadings).

⁷ In *Drexel*, the federal appellate court opined that "[a] six-month interval between the filing of the state court proceeding and the Federal Arbitration Act filing does not constitute the type of actual prejudice necessary to support [a claim of waiver]".

⁸ In *Hofmeister*, some 9 months after commencement of litigation, and following the defendants filing an answer and affirmative defenses (none of which asserted a right to arbitration) plus four successive motions to dismiss (as well as the plaintiff filing a motion for summary judgment), the defendants requested the court compel arbitration of specified portions of the plaintiff's claims in accord with a pre-existing arbitration agreement.

⁹ In *Microstrategy*, after consolidation of two lawsuits filed by the plaintiff-employer and one lawsuit commenced by the defendant-employee, the plaintiff sought to compel enforcement of a written agreement to arbitrate any

invocation of arbitration, which emphasizes, at 249, “the dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*” (emphasis in original). In this regard, “neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration”. *Id.*

Here, even though each case of waiver is to be decided on the basis of its particular facts, *North West Michigan Construction Inc v Stroud*, 185 Mich App 649, 651 (1990), Nexteer’s argument effectively promotes adoption of a “bright line” test that, by suffering a partially successful dismissal motion, “it is indisputable that Nexteer has been prejudiced by Mando’s actions”. Implicitly, Nexteer argues that plaintiffs should be able to maintain (at least in arbitration) claims that are legally deficient. With due respect, without more, like the trial judge in *Hofmeister*, the court does not see how Nexteer suffers actual prejudice by having its claims limited pre-arbitration to only legitimate ones.

To the extent *Capital Mortgage* appears inconsistent with this conclusion, the court notes *Capital Mortgage* (1) does not expressly address prejudice, (2) pre-dates cases recognizing prejudice as a separate element of waiver, see *Madison District Public Schools v Myers*, 247 Mich App 583, n 1 (2001)), and (3) equates summary judgment to trial on the merits (citing *City of Detroit v Nortown Theater, Inc.*, 116 Mich App 386 (1982), a case in which summary judgment was granted on the basis of res judicata), suggesting it was granted because there was no genuine issue as to any material fact (i.e. then GCR 117.2(3)¹⁰, now MCR 2.116(C)(10)), instead of as here, where portions of Nexteer’s claims were summarily dismissed on the pleadings, *MCR 2.116(C)(8)*, thus narrowing the issues to be litigated or, alternatively, submitted to arbitration.

Case Management Order Is A Contract

Nexteer also argues that, regardless of prejudice, the Case Management Order constitutes an agreement, a contract, by Mando to forego arbitration.

With due respect, it is not clear if this is merely a restatement of Nexteer’s argument that Mando waived its right to arbitration, albeit in more formal, express terms (in which case a demonstration of prejudice is required, as previously discussed). Conversely, if a new theory, separate from waiver, is being promoted, Nexteer has failed to establish that a court-imposed Order constitutes a contract.¹¹

controversy or claim arising out of the employment relationship. Even though the appellate court recognized the adverse effect upon the defendant by the plaintiff’s “remarkably aggressive” approach to litigation, it concluded the defendant failed to carry her “heavy burden” of establishing she suffered legally significant prejudice.

¹⁰ The trial court proceedings in *Capital Mortgage*, commenced in 1978, would have been governed by the Michigan General Court Rules of 1963 (GCR), rather than the current Michigan Court Rules of 1985 (MCR), that were not effective until March 1, 1985, just shortly before the Court of Appeals issued its opinion on May 7, 1985.

¹¹ However intriguing, this argument is remarkably underdeveloped. A party cannot simply state a position and then leave it to the court to search for authority to sustain or reject that position. *Beauford v Lewis*, 269 Mich App 295, 298 (2005).

Efficiency and Judicial Economy Favor Single Proceeding

Finally, Nexteer asserts that, apparently regardless of the efficacy of any arbitration agreement, it would simply be more efficient to consolidate both its claims (against Mando and the individual defendants) with the individual defendants' claims against it and third-party defendants pending before the court.

Without more, it is not clear if this is intended as a statement of opinion, preference, prejudice, or absolute law.

In any event, the court has not been made aware of any authority directing the conclusion that the mere existence of non-arbitrable claims of non-signatories negates the court's obligation to generally honor parties' agreements to separate arbitrable claims against signatories and their agents.

Conclusion

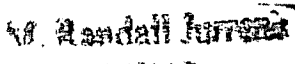
Nexteer has requested the court reconsider its recent grant of leave allowing Mando to file an amended answer to assert a pre-existing arbitration agreement and to then compel arbitration of its claims.

To succeed, Nexteer "must demonstrate palpable error by which the court and parties have been misled and show that a different disposition of the motion must result from correction of the error", *MCR 2.119(F)(3)*.¹²

After reviewing each of Nexteer's arguments, the court is not persuaded that its Opinion is in error or that a different disposition must result. Accordingly, Nexteer's motion for reconsideration of the court's Order granting Mando's motion for leave to file an amended answer and to compel arbitration of all claims is being denied.

IT IS SO ORDERED.

Date: OCT 14 2014



(P27637)
M. Randall Jurrens, Circuit Judge

¹² The court recognizes that, notwithstanding the rule's seemingly demanding language, it has considerable discretion in determining whether a grant of reconsideration is appropriate in a particular case. *Kokx v. Bylenga*, 241 Mich App 655, 659 (2000); *Fetz Engineering Co v. Ecco Systems, Inc*, 188 Mich App 362, 373 (1991).

EXHIBIT G

2008 WL 3850709

Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
at Louisville.

John D. McLAUGHLIN, Plaintiff

v.

CSX TRANSPORTATION, INC.,
Defendant/Third Party Plaintiff

v.

Cattron–Theimeg, Inc., Third Party Defendant.

Civil Action No. 3:06CV–154–H.

|

Aug. 14, 2008.

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Catherine M. Stevens, Susan J. Pope, Frost Brown Todd LLC, Lexington, KY, for Third Party Defendant.

MEMORANDUM OPINION AND ORDER

JOHN G. HEYBURN II, Chief Judge.

*1 The Court now considers the motion of the Third Party Defendant, Cattron–Theimeg, Inc. (“Cattron”), to stay the current proceedings and compel arbitration of the dispute between it and Defendant, CSX Transportation, Inc. (“CSX”).

Plaintiff, McLaughlin, filed this action against CSX, alleging that while he was employed as a conductor working in the Osborn Yard in Louisville, he was injured when a remote control device malfunctioned causing the locomotive to automatically apply its emergency brakes. When this happened, McLaughlin was thrown off the train and allegedly sustained injuries. McLaughlin claims that CSX violated the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.* (“FELA”) as well as the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.* by providing an unsafe remote control

device that was not in a proper condition to be safely operated without unnecessary danger of personal injury to the operator.

In November, 2006, CSX filed a third party complaint adding Cattron as a Defendant alleging that Cattron manufactured and sold the operating control unit and that it had promised to indemnify CSX for any injuries that arose out of its use. The Cattron–CSX Agreement also contained an ‘arbitration provision, which Cattron now asserts requires a stay of the current third party proceedings.

CSX does not argue that the arbitration agreement is invalid. Indeed, arbitration agreements are strongly favored, though a party may waive that right either expressly or implicitly. *O.J. Distributing, Inc. v. Hornell Brewing Company*, 340 F.3d 345, 365 (6th Cir.2003). Waiver will only be recognized, however, where the party opposing arbitration shows specific conduct completely inconsistent with an intent to arbitrate and some prejudice to itself due to the subsequent demand of arbitration. *Id.* at 356.¹

¹ The Court does not find *American Locomotive Co. v. Gyro Process Co., et al.*, 185 F.2d 316, 319–20 (6th Cir.1950), to be particularly relevant or helpful in these entirely different circumstances.

This case presents a close call. On one hand, Cattron never expressly waived its contractual right to arbitrate this dispute and, in fact, has always asserted the arbitration defense in its answers to the third party complaint. On the other hand, it did not move for a stay throughout one and half years of litigation and it actively participated in that litigation. Many of its actions were entirely inconsistent with the idea of arbitrating its dispute with CSX. The question of contractual indemnity is one which might easily and naturally be decided at the same time as CSX's liability under the various federal statutes. Consequently, CSX is inconvenienced by not having the indemnity issue resolved with the liability claims against it.

Most significant, Cattron waited until one month prior to the scheduled trial date to assert its arbitration rights directly. By waiting so long, while voluntarily sampling the litigation process, the Court concludes that Cattron has waived the right to now obtain a stay to which it might earlier have been entitled.

The Court recognizes that Cattron may well avail itself of the interlocutory appeal provisions contained in the 1988 Judicial Improvements and Access to Justice Act, 9 U.S.C. § 16. Such

an appeal, if taken, might well be accompanied by a motion in this Court to stay any proceedings relative to the CSX/Cattron dispute. Regardless, none of these actions should have any impact upon the trial of McLaughlin's underlying claims. The Court makes its ruling irrespective of its potential inconsequence.

IT IS HEREBY ORDERED that the motion of Cattron-Theimeg, Inc., to stay the third party proceedings and compel arbitration is DENIED.

All Citations

*2 Being otherwise sufficiently advised,

Not Reported in F.Supp.2d, 2008 WL 3850709

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EXHIBIT H

2007 WL 2984188

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.

GEORGE S. HOFMEISTER
FAMILY TRUST, et al, Plaintiffs,
v.

FGH INDUSTRIES, LLC, et al, Defendants.

No. 06-CV-13984-DT.

|
Oct. 12, 2007.

Attorneys and Law Firms

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AMENDED * ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO COMPEL ARBITRATION

* The court enters this amended order to correct a clerical error that appeared in the last full paragraph on page 7 of the court's September 26, 2007 opinion and order. The sentence in that paragraph beginning with "Although the arbitration clause ..." is replaced herein by a sentence beginning with "Admittedly, the arbitration clause...." In substance and effect, the court's opinion and order is unchanged.

ROBERT H. CLELAND, United States District Judge.

*1 Pending before the court is "Defendants Fuhrman and Gruits' Motion to Compel Arbitration," which was filed on June 21, 2007. Plaintiffs' response was filed on July 3, 2007. In their motion, Defendants request an order requiring the parties to arbitrate Counts IV, VI and VIII of the Plaintiffs' complaint. The issue has been fully briefed by the parties and the court has held a hearing on the matter on September 5,

2007.¹ For the reasons stated below, Defendants' motion will be granted in part and denied in part.

¹ Case law in both the United States Supreme Court and the Court of Appeals for the Sixth Circuit establish that a hearing is required before a district court may enforce an arbitration agreement. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 451 (6th Cir.2005); see also 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.").

I. BACKGROUND²

² Much of the factual background is set forth in previous orders and is not central to the issue before the court.

Plaintiffs originally filed a complaint in state court on October 21, 2005. (Pls.' Mot. at 5; Pls.' Ex. 3.) Plaintiffs contend that they agreed to voluntarily dismiss the case and file it again elsewhere rather than litigate jurisdiction in state court, which might have entailed a lengthy appeal. (*Id.* at 7.) Plaintiffs filed their complaint in federal court on September 8, 2006, invoking the diversity jurisdiction of the court. (Compl. at ¶ 13.) The complaint alleges eleven counts against Defendants. (*Id.* at ¶¶ 70-132.)

On October 6, 2006, the court entered a consent order permitting an extension of time to answer the complaint or take other action until October 30, 2006. (10/6/06 Order.) Thereafter, the court entertained multiple motions, which resulted in the dismissal of several claims, dismissal of non-diverse defendants and entry of a preliminary injunction. (12/15/06 Order.) During the pendency of these motions (and other motions related to the preliminary injunction granted by this court), Defendants were not required to file an answer to the complaint.

Defendants filed their answer to the allegations in the complaint on January 16, 2007. In their answer, Defendants put forth eighteen affirmative defenses, none of which asserted a contractual right to submit the disputes to arbitration. (Answer at 26-28.) During the two months that followed, Defendants filed additional motions, which resulted in an order dismissing several more of the Plaintiffs' claims.

(4/12/07 Order.) Plaintiffs' "Motion for Summary Judgment Regarding Count VIII of Their Complaint" is still pending before the court.

The instant motion, filed on June 21, 2007, seeks an order compelling the parties to arbitrate Counts IV, VI and VIII of Plaintiffs' complaint "in accordance with the parties' agreement to arbitrate as set for [sic] in the Recapitalization Agreement." (Defs.' Mot. at 1.) Section 5.14 of the Recapitalization Agreement states that "[a]ny and all disputes, controversies or claims arising out of or related in any way to this Agreement or any of the Attendant Documents shall be resolved by way of arbitration, as provided in this Section 5.14; provided, however, that a party may seek a preliminary injunction or other provisional judicial relief." (Defs.' Mot. at 1; Agreement at 12, Defs.' Ex. A.)

II. STANDARD

The Federal Arbitration Act ("FAA") provides that arbitration clauses contained in commercial contracts are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity." 9 U.S.C. § 2. "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Cone Mem'l Hosp.*, 460 U.S. at 24; *see also Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 392-93 (6th Cir.2003) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)). If a district court determines that a claim is within the scope of the arbitration clause in question, it is required to stay the proceedings "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. In order to compel the parties to arbitrate a claim, the district court must conduct a hearing, and:

*2 upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement ... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4. "Under this statutory scheme, the district court must make four threshold determinations before compelling arbitration:

first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration."

Glazer, 394 F.3d at 451 (quoting *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir.2000)). If any doubts remain regarding the arbitrability of a claim, they must be resolved in favor of arbitration. *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6th Cir.2003) (citing *Fazio*, 340 F.3d at 392).

III. DISCUSSION

A. The Parties Agreed to Arbitration

Although Plaintiffs insist that Defendants have waived any right to demand arbitration, the court must first determine that such a right existed. *Stout*, 228 F.3d at 714 ("when asked by a party to compel arbitration under a contract, a federal court must determine whether the parties have agreed to arbitrate the dispute at issue"). If Defendants ever had a right to demand that Counts IV, VI and VIII of the Plaintiffs' complaint be arbitrated, that right arose by mutual agreement to be bound by the arbitration clause contained at Section 5.14 of the Recapitalization Agreement. If the court determines that the parties have agreed to arbitrate their disputes and the arbitration agreement is otherwise valid, then the court must compel arbitration. *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir.2002).

The parties do not dispute that they voluntarily entered into the Recapitalization Agreement. (Defs.' Br. at 5.) Nor do they dispute that the arbitration clause was valid and enforceable

at the time they bound themselves to the Recapitalization Agreement. Plaintiffs do not take issue with the validity of the arbitration agreement. In fact, in their brief Plaintiffs concede that Count VIII would be an arbitrable issue if not for Defendants' alleged waiver. (Pls.' Br. at 14.) At the time the parties entered into the Recapitalization Agreement, Defendants had a right to demand arbitration of "[a]ny and all disputes, controversies or claims arising out of or related in any way to [the Recapitalization Agreement] or any Attendant Documents." (Defs.' Mot. at 1; Agreement at 12, Defs.' Ex. A.) An earlier clause in the Recapitalization Agreement defines Attendant Documents as "all of the other agreements and documents contemplated by this [Recapitalization] Agreement" (*Id.*)

B. Counts IV, VI and VIII Are Within the Scope of the Arbitration Agreement

*3 Before the court may compel arbitration of Counts IV, VI and VIII, the court must conclude that the disputed issues are within the scope of the arbitration agreement. *Stout*, 228 F.3d at 714. As noted above, there is a general presumption in favor of arbitrability. *Highlands Wellmont*, 350 F.3d at 573. Furthermore, this presumption controls "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Glazer*, 394 F.3d at 450 (quoting *Highlands Wellmont*, 350 F.3d at 576-77). Where the arbitration clause in question is broadly constructed, "only an express provision excluding a specific dispute, or 'the most forceful evidence of a purpose to exclude the claim from arbitration,' will remove the dispute from consideration by the arbitrators." *Id.*

Because Plaintiffs have conceded that Count VIII is within the scope of the arbitration clause, the court must address only whether Counts IV and VI are arbitrable issues. "A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." *Fazio*, 340 F.3d at 395.

Assuming *arguendo* that the relationship between Plaintiffs and Defendants are fiduciary in nature, Count IV claims that:

[Defendants] have violated and continue to violate their fiduciary duties to Trans and its shareholders by:

a. Removing Mr. Hofmeister from the Board of Directors of Trans in order to gain control of Trans and convert

the Converted Assets, and continuing to exclude Mr. Hofmeister and the Trusts from the governance of Trans, despite the fact that this exclusion is not in the best interest of Trans or its shareholder;

- b. Causing Trans to cease making distributions to the Trusts as required under the [Recapitalization Agreement], and to continue to breach the Agreement by failing to make required distributions;
- c. Taking compensation in the form of the Converted Fees from Trans in an amount that was and continues to be exorbitant and unreasonable in violation of MCL 450.1545(a)(4);
- d. Engaging in self-interested transactions that are not fair to Trans, carrying out these interested transactions in secret, and failing to disclose to and seek approval for these transactions from a disinterested party as required by law,
- e. Using Trans to pay for personal expenses, including travel, personal business opportunities and attorneys' fees, and
- f. Other breaches that may be discovered.

(Compl. at ¶ 91.) Defendants' contention is that by including within paragraph 91 allegations that Defendants violated their fiduciary duty to Plaintiffs by ceasing to make "distributions to the Trusts as required under the [Recapitalization Agreement]," the claim for breach of fiduciary duty is transformed into an arbitrable issue, rather than an independent claim that may be litigated. (Defs.' Br. at 5-6.) Plaintiffs, however, point out that Defendants' "argument ignores the fact that [Count IV] would exist without these allegations of their non-payment of distributions." (Pls.' Br. at 14.) Plaintiffs' allegation in paragraph 91 "is just one fact of many other facts alleged that would prove that they have breached their fiduciary duties to Trans and its shareholders." (*Id.*)

*4 While the court is persuaded that Plaintiffs' claim of breach of fiduciary duty could be maintained without reference to the Recapitalization Agreement, the inquiry does not end there. The scope of the arbitration agreement goes beyond the Recapitalization Agreement to all documents contemplated by that Agreement-the Attendant Documents. The remaining allegations in Count IV depend upon alleged breaches of fiduciary duties. Those duties, in turn, arise from the Attendant Documents, as Plaintiffs assert those

documents would otherwise have no legal relationship with Defendants Fuhrman and Gruits that would give rise to claims of breach of fiduciary duty. Given the strong federal policy in favor of arbitration and the relatively broad scope of the parties arbitration clause, the court cannot conclude that Count IV is “likely outside the scope of the arbitration.” *Fazio*, 340 F.3d at 395. Admittedly, the arbitration clause is quite broad and there is no explicit provision excluding Count IV from the arbitration requirement. But because only *unrelated* allegations of wrongdoing by a fiduciary provide “the most forceful evidence of a purpose to exclude the claim from arbitration,” *Glazer*, 394 F.3d at 450, the court cannot conclude the same in this case, where the alleged wrongdoing clearly relates to the Attendant Documents contemplated by the Recapitalization Agreement and, specifically, the arbitration clause.

Count VI presents the same question. Plaintiffs claim in Count VI that:

[Defendants] have carried out their illegal and wrongful plan to oppress the Trusts by doing the following:

- a. causing FGH Industries (which is under the control of FGH Capital) to oppress the Trusts' minority interest in Trans as described in paragraph 89;
- b. causing Trans to cease making distributions to the Trusts as required under the [Recapitalization Agreement];
- c. [dismissed pursuant to 04/12/07 Order];
- d. failing to cause FGH Capital and FGH Industries to make distributions to the Trusts; and
- e. other actions that may be discovered.

(Compl. at ¶ 103.) Defendants' argument is essentially identical to that made in favor of compelling arbitration of Count IV. Therefore, the court employs the same analysis and evaluates whether “an action could be maintained without reference to the contract or relationship at issue.” *Fazio*, 340 F.3d at 395.

Plaintiffs again argue that “Plaintiffs' allegation that [Defendants] failed to make distributions as required by the [Recapitalization Agreement] is just one fact of many other facts alleged that would prove that they have breached their fiduciary duties to Trans and its shareholders.” (Pls.' Br. at 14.) This argument is also not persuasive with respect to Count VI. Paragraphs 103(b) & (d), the two most

substantive averments contained in paragraph 103, allege failure to make distributions to the Trusts as required by the Recapitalization Agreement. Paragraph 103(a) consists only of vague allegations incorporating paragraphs 1 through 88.³ The remaining averment, paragraph 103(e), contains only boilerplate language devoid of substance. As such, Count VI rises and falls with allegations of failure to make disbursements, which fall squarely within the purview of the Recapitalization Agreement, whatever the scope of the Attendant Documents. The court concludes that, absent paragraphs 103(b) and 103(d), Count VI would not sufficiently state a claim that would fall outside of the parties' agreement to arbitrate.

³ Paragraph 103(a) refers to paragraph 89 contained within Count IV of the complaint, which merely incorporates the allegations contained in paragraphs 1 through 88.

*5 Two additional considerations support this conclusion. Most importantly, as noted above, there is a strong presumption in favor of arbitration and any doubts as to the arbitrability of a claim must be resolved in favor of arbitration. *Highlands Wellmont*, 350 F.3d at 573. Even if the court were not convinced that, absent those allegations referring to the Recapitalization Agreement, the claim could not be maintained, the federal policy favoring arbitration would likely overcome the vague nature of the remaining allegations. Second, “any ambiguity in the contract or doubts as to the *parties' intentions* should be resolved in favor of arbitration.” *Great Earth Cos., Inc.*, 288 F.3d at 889 (quoting *Stout*, 228 F.3d at 714) (emphasis added). Section 5.14 of the Recapitalization Agreement stipulates that “[t]he parties acknowledge that it is their intent to expedite the resolution of the dispute, controversy or claim in question, and that the Arbitrators shall schedule the timing of the hearing consistent with that intent.” (Agreement at 12, Defs.' Ex. A.) This language makes it clear that the parties intended to expedite the resolution of disputes arising of or relating to the Recapitalization Agreement through arbitration. Plaintiffs' efforts to litigate as many claims as possible in federal court is inconsistent with this intention.

C. Defendants Did Not Waive Their Right to Demand Arbitration

Plaintiffs make three arguments in support of their contention that Defendants have waived their right to demand arbitration: by (1) actively participating in the state court action and

by taking actions inconsistent with demanding arbitration, (2) actively litigating after the federal court action had commenced and (3) failing to compel arbitration earlier. (Pls.' Br. at 11-13.)

In order to adequately address Plaintiffs' arguments, the court must first determine whether state or federal law provides the proper standard for reviewing an alleged waiver of an arbitration agreement within the coverage of the FAA. Section 5.3 of the Recapitalization Agreement states that, "[t]his agreement has been executed in, and shall be construed and enforced in accordance with the laws of, the State of Michigan without regard to the conflicts of law principles thereof." (Defs.' Ex. A at 10.) However, "even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue." *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir.1997) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995)). The issue here is whether the right to enforce the arbitration clause has been waived. Article 5.8 of the Agreement states the following:

No party shall be deemed to have waived compliance by any other party with any provision of this Agreement unless such waiver is in writing, and the failure of any party at any time to enforce any of the provisions of this Agreement shall in no way be construed as a waiver of such provisions and shall not affect the rights of any party thereafter to enforce such provisions in accordance with their terms.

*6 (Agreement at 11, Defs.' Ex. A.) The record is void of any written waiver of the arbitration agreement by Defendants. The court does not accept Plaintiff's argument, advanced at the hearing, that the filing of a suit in state court by Defendants constitutes a written waiver of the arbitration clause.

Further, in the context of this case, the court concludes that the FAA preempts state law regarding arbitration.⁴ *Southland Corp.*, 465 U.S. at 10-11. "[A]n agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon." *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438

(6th Cir.2003) (quoting *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir.1973)). However, waiver of the right to arbitrate claims within the scope of an arbitration agreement is not to be lightly inferred. *Highlands Wellmont*, 350 F.3d at 573 (citing *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 355 (6th Cir.2003)). "A party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice." *Gen. Star Nat'l Ins. Co.*, 289 F.3d at 438 (citing *Doctor's Assocs., Inc.*, 107 F.3d at 131). Additionally, other courts have held that "[a] party may waive its right to insist on arbitration if the party 'so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.'" *Microstrategy, Inc.*, 268 F.3d at 249 (quoting *Maxum Founds., v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir.1985)). "[D]elay and the extent of the moving party's trial-oriented activity are material factors in assessing a plea of prejudice." *Id.* (citation omitted). However, any doubts regarding the arbitrability of a dispute should be resolved in favor of arbitration, even when assessing an allegation of waiver. *Cone Mem'l Hosp.*, 460 U.S. at 24-25. Therefore, with respect to all three of Plaintiffs' arguments, the question to be answered is "whether the party objecting to arbitration has suffered *actual prejudice*." *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir.2001) (quoting *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir.1987)) (emphasis added).

4 Plaintiffs' reliance on *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), in support of their assertion that "Michigan law applies to determine if the [Defendants] have waived their right to seek arbitration," is misplaced. (Pls.' Br. at 10.) The *Dobson* Court's discussion is limited to the invalidation of arbitration clauses, not the waiver of admittedly valid arbitration clauses.

Plaintiffs' first argument would have this court take into consideration litigation activity that took place in a prior state court action. Plaintiffs argue that Defendants acted inconsistently with any right to arbitrate during the state court proceeding by filing a counter-claim, filing motions and serving discovery requests upon Plaintiffs. (Pls.' Br. at 11.) However, Plaintiffs acknowledge that Defendants did assert their right to arbitrate in both their answer to the complaint and their answer to the amended complaint. (Pls.' Br. at 5-6.) Furthermore, Plaintiffs do not draw the court's attention to any binding precedent that would compel this court to infer waiver from Defendants' participation in litigation activity in a prior proceeding that resulted in no judgment on the merits.

Neither party identifies the nature of the motions entertained by the state court in that proceeding or the extent to which those issues were litigated before the parties voluntarily dismissed the suit. Nor do the parties provide the court with any indication of the attendant cost of such litigation activity. Additionally, the court finds it significant that the parties agreed in the Recapitalization Agreement that, should any dispute go to arbitration, the parties would be entitled to “reasonable levels of discovery.”⁵ (Agreement at 12, Pls.’ Ex. A.) It is likely that Defendants would have obtained the same information in an arbitration proceeding, thereby mitigating any claim of actual prejudice. *See Microstrategy, Inc.*, 268 F.3d at 251. In light of the strong federal policy in favor of enforcing arbitration agreements, the court finds that the litigation activity conducted in the state court action is insufficient to warrant an inference of waiver.

⁵ Section 5.14 of the Recapitalization Agreement provides that, “[i]n any such arbitration proceeding, the Arbitration Parties shall be entitled to reasonable levels of discovery in accordance with the Federal Rules of Civil Procedure.” (Agreement at 12, Pls.’ Ex. A.)

*7 Plaintiffs also attempt, in part, to reargue whether the delay and litigation activity associated with the state court action resulted in waiver. Those arguments have already been addressed, and there is no need for the court to revisit them.

The thrust of Plaintiffs’ remaining arguments is that delay and litigation activity conducted during this federal court action have resulted in actual prejudice to Plaintiffs. Plaintiffs argue that “[Defendants] ask for this relief after they have litigated in this Court for almost 10 months, filing and responding to pleadings and motions, participating in conferences with this Court, all without a mention of their alleged right to arbitrate.” (Pls.’ Br. at 12.) Additionally, Plaintiffs contend that, “[i]n the intervening time, the Plaintiffs have born [sic] the expense of litigating the ... Federal Court Action.” (Pls.’ Br. at 13.) These arguments are not persuasive.

Upon review of the docket, the court notes that this suit was filed in federal court on September 8, 2006 and the pending motion to compel was filed on June 21, 2007. During the intervening year, Defendants have filed six motions. Defendants’ motions included:

1. Defendants’ Motion to Dismiss Pursuant to Rule 12(b) (1) for Lack of Subject Matter Jurisdiction [Dkt # 22];

2. Motion for Order Suspending/Staying December 15, 2007 Preliminary Injunction [Dkt # 37];
3. Defendants’ Motion to Dismiss Counts I and II of Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) [Dkt # 54];
4. Defendants’ Motion to Dismiss Count VI of Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) [Dkt # 55];
5. Defendants’ Motion to Dismiss Count VII Complaint Pursuant to Fed.R.Civ.P. 56 and 12(b)(6) [Dkt # 56]; and
6. Defendants Fuhrman and Gruits’ Motion to Compel Arbitration [Dkt # 91].

All but one of Defendants’ motions seek to eliminate disputes between the parties either by dismissal at an early stage of the proceeding or by resolution at the agreed-upon forum. Plaintiffs, on the other hand, chose to file in federal court despite Defendants’ prior assertions that Plaintiffs’ claims were barred by an agreement to arbitrate. (Pls.’ Br. at 5-6.) Since initiating suit in federal court, Plaintiffs have filed no less than fifteen motions, many of which have been unrelated to the substance of the complaint, and have been resolved at an early stage in the proceedings. The vast majority of the motions filed by both sides do not relate to the counts potentially subject to arbitration. The Sixth Circuit has recognized that “waiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of the contract, but attempts to meet all issues raised in litigation between it and another party to the agreement.” *Germany*, 477 F.2d at 547 (citing *Gen. Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir.1970)).

It appears that Defendants have attempted to minimize the number of counts that need to be litigated in this court or, alternatively, submitted to arbitration, through the use of pretrial motions. Only after these initial motions did Defendants file the instant motion to compel arbitration. Moreover, Defendants do not seek to compel arbitration of all counts, but only those they assert are arbitrable. At the very least, an equal part of the delay and expense involved in this case appears to be a result of the extent to which Plaintiffs have chosen to engage in motion practice. The court cannot hold Defendants responsible for the entirety of the delay and expense. Moreover, there is no evidence that the delay involved in Defendants’ attempt to narrow the scope of the lawsuit has caused any actual prejudice to Plaintiffs. *Gen. Star Nat’l Ins. Co.*, 289 F.3d at 438 (citing *Doctor’s*

Assocs., Inc., 107 F.3d at 131). In consideration of the strong preference in favor of arbitration and against waiver, the court cannot infer waiver based upon the parties' conduct at this stage of their dispute.

D. The Complaint Does Not Assert any Federal Statutory Claims

*8 The court agrees with Defendants that "Plaintiffs' complaint does not allege the violation of any Federal [sic] statutory claims." (Defs.' Br. at 4.) Therefore, the court need not consider whether Congress intended any of Plaintiffs' claims to be nonarbitrable. *Stout*, 228 F.3d at 714.

E. The Remaining Claims Should Not Be Stayed Pending Arbitration

The FAA mandates that, after conducting a hearing and "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. Therefore, the court is required to compel arbitration of Counts IV, VI and VIII, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

Because the court finds that the parties entered into a valid arbitration agreement, Counts IV, VI and VIII are within the scope of the agreement and Defendants did not waive their rights under the agreement, the parties will be directed to proceed to arbitration on these claims. The only question left for the court to address is whether to stay the remainder of the proceedings pending arbitration. *Stout*, 228 F.3d at 714. Defendants contend that because "the Recapitalization Agreement and the parties' performance there under [sic] is entwined in several of Plaintiffs' claims," it is appropriate for this court to stay the remaining proceedings pending resolution of Counts IV, VI and VIII. (Defs.' Br. at 6.)

The court is not inclined to agree. The factual and legal questions raised by the arbitrable Counts bear little relation to those arising out of the remaining⁶ state law claims. The remaining claims, as they appear to the court, are the following:

- 6 Prior motion practice has disposed of several Counts in Plaintiffs' complaint.
- (1) Aiding in the Concealment of Converted Property (Count II)
- (2) Breach of Fiduciary Duty to Trusts (Count V)
- (3) Unjust Enrichment (Count VII)
- (4) Breach of Contract for Failure to Pay Management Fees (Count IX)
- (5) Civil Conspiracy (Count X)
- (6) Injunctive Relief (Count XI)

Those claims may be resolved independently by this court without awaiting the results of arbitration. The arbitrable Counts concern, in the main, rights and duties pertaining to the management of Trans whereas the other Counts go beyond Trans to matters between the Plaintiffs and Defendants that do not directly implicate the operation of Trans.⁷ Further, even if all of Plaintiffs' claims involved similar factual and legal questions, "arbitration proceedings [would] not necessarily have a preclusive effect on subsequent federal-court proceedings." *Dean Witter Reynolds, Inc.*, 470 U.S. at 223. Furthermore, the court observes that the remaining claims are not so "entwined" as to have prompted Defendants to move this court to compel arbitration of those claims as well. Therefore, the court will compel arbitration of Counts IV, VI and VIII and proceed to resolve the Plaintiffs' remaining claims without staying the proceedings in this court.

- 7 At the same time, to the extent that the remaining claims mention Trans or implicate its operation, they may proceed in this court even though such arrangement might mean "the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc.*, 470 U.S. at 217.

V. CONCLUSION

*9 IT IS ORDERED that "Defendants Fuhrman and Gruits' Motion to Compel Arbitration" [Dkt # 91] is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED as it pertains to Counts IV, VI and VIII of Plaintiffs' complaint and DENIED in its request for a stay of proceedings.

All Citations

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EXHIBIT I

2012 WL 555801

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Carol TOBEL, Individually and as Trustee of the Carol Tobel Revocable Living TRUST and as Trustee of the Kevin W. Tobel Irrevocable Trust dated October 12, 2001, Kevin Tobel, Individually and as Trustee of the Kevin Tobel Revocable Living Trust, Mary Lynn Tobel, Individually and as Trustee of the Mary Lynn Tobel Revocable Living Trust and as Trustee of the Charles M. Tobel Irrevocable Trust dated October 12, 2001, and Charles Tobel, Individually and as Trustee of the Charles Tobel Revocable Living Trust, Plaintiffs–Appellants,

v.

AXA EQUITABLE LIFE INSURANCE COMPANY, AXA Distributors, L.L.C., and Robert W. Baird and Company, Inc., Defendants–Appellees, and
Jeffrey Hyman, Defendant.

Docket No. 298129.

|

Feb. 21, 2012.

Wayne Circuit Court; LC No. 09–024832–CK.

Before: SERVITTO, P.J., and TALBOT and K.F. KELLY, JJ.

Opinion

PER CURIAM.

*1 Plaintiffs appeal as of right from the trial court's order compelling plaintiffs to submit all of their claims against defendant Robert W. Baird and Company, Inc. (“Baird”) and defendants AXA Equitable Life Insurance Company and AXA Distributors, L.L.C. (collectively referred to as “AXA”) to arbitration. We affirm.

Plaintiffs Kevin Tobel and Charles Tobel are brothers who each entered into a Cash Account Agreement with defendant Baird, to obtain financial services. Each agreement provides that it applies “to any and all Baird accounts in which Client is

the beneficial owner, including accounts opened prior to the date of execution of this Agreement and any Baird account opened after execution of this Agreement.” The agreements also contain arbitration clauses that provide, in pertinent part:

19. **Arbitration Agreement.** The Client agrees and, by carrying any account for the Client, Baird agrees that all controversies between the Client and Baird or any of Baird's present or former officers, directors, agents or employees which may arise for any cause whatsoever, shall be determined by arbitration. Any arbitration under this Arbitration Agreement shall be before the National Association of Securities Dealers, Inc., or the New York Stock Exchange, Inc., and shall be conducted in accordance with the rules of such organization....

* * *

This Arbitration Agreement shall apply to any controversy or claim or issue in any controversy arising from events that occurred prior, on, or subsequent to the execution of this Arbitration Agreement with respect to any and all Client Accounts....

Plaintiffs allege that, based on financial advice from Rex Stanczak, an employee and agent of Baird, and defendant Jeffrey Hyman, an officer of AXA, Kevin and Charles each acquired, through Baird, a \$4 million flexible premium variable life insurance policy from AXA. According to plaintiffs' complaint, at some point, the policies were transferred to trusts established by the two families, under which plaintiff Mary Lynn Tobel (Kevin's wife) and plaintiff Carol Tobel (Charles's wife) were named as trustees.¹

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Plaintiffs' complaint erroneously referred to Carol Tobel as Kevin's wife, and to Mary Lynn Tobel as Charles's wife. Carol is actually Charles's wife and Mary Lynn is actually Kevin's wife. Plaintiffs filed a motion to amend their complaint to correct these errors, as well as to assert that the policies at issue were always owned by the trusts, rather than transferred to them at some point in time, but the trial court denied the motion as moot after it ordered all parties to submit their claims to arbitration.

Plaintiffs Kevin and Mary Lynn Tobel and Charles and Carol Tobel filed this action against Baird and AXA, alleging that defendants knowingly misrepresented the cost of the premiums for the policies and failed to explain the various risks associated with variable life insurance policies. Plaintiffs also alleged that both defendants failed to properly supervise and train its agents with respect to the sale of

the policies. The complaint alleged that Baird was acting as AXA's agent at all relevant times, and asserted a total of 13 different counts against both defendants under various theories of fraud, securities violations, breach of fiduciary duty, negligence, and breach of contract.

Baird moved to compel plaintiffs to submit their claims to arbitration in accordance with the arbitration provision in ¶ 19 of the Cash Account Agreements signed by Kevin and Charles. AXA later joined in the motion. Plaintiffs disputed the validity of the arbitration agreements and also challenged the applicability of the agreements to the claims of Mary Lynn and Carol, nonsignatories to the agreements. Plaintiffs also argued that AXA could not rely on the agreements to compel arbitration of the claims against it, because AXA was not a party to the agreements. The trial court determined that the arbitration agreements were enforceable to compel arbitration of the claims by Kevin and Charles, and further determined that Mary Lynn's and Carol's claims could be submitted to arbitration even though they were not parties to the arbitration agreements. The court also ruled that AXA could compel plaintiffs to arbitrate their claims against it because AXA was an agent of Baird and plaintiffs' claims against AXA were so intertwined with their claims against Baird that all claims should go to arbitration.

I. STANDARD OF REVIEW

*2 Although Baird did not identify its motion to compel arbitration as a motion for summary disposition, the motion substantively sought, and the trial court substantively granted, summary disposition of the case. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v. Dep't of Transp.*, 456 Mich. 331, 337; 572 NW2d 201 (1998). In addition, when the applicable subrule is not identified, this Court will review the trial court's decision under the correct subrule. *Id.* at 338 n9. Summary disposition may be granted under MCR 2.116(C)(7) when a "claim is barred because of ... an agreement to arbitrate[.]" The following standards apply to a motion under MCR 2.116(C)(7):

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR

2.116(G)(3); *Patterson v. Kleiman*, 447 Mich. 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v. Mercy Hosps & Health Servs of Detroit*, 210 Mich.App 345, 348; 533 NW2d 365 (1995).]

The existence and enforceability of an arbitration agreement is also reviewed de novo as a question of law. *Michelson v. Voison*, 254 Mich.App 691, 693–694; 658 NW2d 188 (2003).

II. VALIDITY OF THE ARBITRATION AGREEMENT

Initially, although we agree with plaintiffs that the Federal Arbitration Act (FAA), 9 USC 1 *et seq.*, applies to this dispute, plaintiffs have not shown that any conflict exists between the FAA and state law. In *Kauffman v. Chicago Corp.*, 187 Mich.App 284, 286; 466 NW2d 726 (1991), this Court explained the scope and application of the FAA as follows:

The federal arbitration act, 9 USC 1–15, governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Southland Corp v. Keating*, 465 U.S. 1; 104 S Ct 852; 79 L.Ed.2d 1 (1984); *Scanlon v. P & J Enterprises*, 182 Mich.App 347; 451 NW2d 616 (1990)... State courts are bound under the Supremacy Clause, U.S. Const, art VI, § 2, to enforce the substantive provisions of the federal act. *Scanlon, supra*.

The Supremacy Clause precludes this Court from applying state law to defeat federal legislation. Therefore, where the FAA applies, it preempts any state law or policy that specifically invalidates arbitration agreements. In *Abela v. Gen Motors Corp.*, 257 Mich.App 513, 525; 669 NW2d 271 (2003), *aff'd* 469 Mich. 603 (2004), this Court explained

that “[t]he case law is clear that the FAA surmounts any state law that invalidates agreements to submit claims to binding arbitration.” Therefore, a state may not apply its laws to invalidate an otherwise valid arbitration clause because the FAA implicates the Supremacy Clause. *Id.* at 524–525. However, 9 USC 2 recognizes that to be enforceable under the FAA, there must first be a valid and enforceable agreement to arbitrate, which can be decided on the basis of state contract law:

*3 A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Thus, “state laws governing contracts in general do not conflict with the FAA simply because they also affect arbitration contracts.” *DeCaminada v. Coopers & Lybrand, LLP*, 232 Mich.App 492, 502 n7; 591 NW2d 364 (1998).

Plaintiffs correctly assert that they cannot be compelled to submit to arbitration any claim for which there is no agreement to arbitrate. As explained in *Amtower v. William C Roney & Co (On Remand)*, 232 Mich.App 226, 233–234; 590 NW2d 580 (1998):

“ ‘[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit.’ “ *AT & T Technologies, Inc v. Communications Workers of America*, 475 U.S. 643, 648; 106 S Ct 1415; 89 L.Ed.2d 648 (1986) (citations omitted). Thus, “the basic objective in this area is ... to ensure that commercial arbitration agreements, like other contracts, ‘are enforced according to their terms,’

and according to the intentions of the parties.” *First Options of Chicago, Inc v. Kaplan*, 514 U.S. 938, 947; 115 S Ct 1920; 131 L.Ed.2d 985 (1995) (citations omitted).

The parties' agreement generally determines the scope of arbitration. *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich.App 146, 163; 742 NW2d 409 (2007).

“To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract.” *Huntington Woods [v Ajax Paving Industries, Inc (After Remand)]*, 196 Mich.App 71, 74–75; 492 NW2d 463 (1992)]. The court should resolve all conflicts in favor of arbitration. *Id.* at 75. However, a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. *Brucker v. McKinlay Transport, Inc*, 454 Mich. 8, 15, 17–18; 557 NW2d 536 (1997). Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation. [*Id.*, quoting *Fromm v. MEEMIC Ins Co*, 264 Mich.App 302, 305–306; 690 NW2d 528 (2004).]

Where the language of a contract's arbitration clause is clear and unambiguous, the intent of the parties will be determined according to the plain meaning of the language. *Amtower*, 232 Mich.App at 234.

*4 However, consistent with the strong federal policy promoting arbitration, any ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution. See *AT & T Technologies*, *supra* at 650. In other words, there is a presumption of arbitrability “ ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.’ “ *Id.*, quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co*, 363 U.S. 574, 582–583; 80 S Ct 1347; 4 L.Ed.2d 1409 (1960). In *First Options [of Chicago, Inc v. Kaplan]*, *supra* at [514 U.S. 938,] at 945 [; 115 S Ct 1920; 131 L.Ed.2d 985 (1995)], the Court explained that when the parties have a contract that provides for arbitration of

some issues, “the parties likely gave at least some thought to the scope of arbitration.” Therefore, the law “insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter.” *Id.* [Amtower, 232 Mich.App at 234–235 (footnote omitted).]

Plaintiffs argue that the arbitration clauses in the Cash Account Agreements are not valid and enforceable against any of them because the agreements are illusory, inasmuch as Baird had the right to amend or modify the agreements at any time. Plaintiffs rely on ¶ 17 of the Cash Account Agreements, which provides:

17. **Amendment.** Baird may amend this Agreement at any time. Any amendment shall be effective upon notice to the Client. Notice of amendment to this Agreement shall be posted on Baird's Internet website at www.rwbaird.com and shall be made available to Client by Client's Baird Financial Advisor. Baird may, at its discretion, terminate this Agreement at any time, effective upon notice to the Client. In the event of the termination of this Agreement, the Client will continue to be responsible for any obligations incurred by the Client prior to termination.

In *Ile v. Foremost Ins Co.*, — Mich.App —; — NW2d — (Docket No. 295685, issued July 14, 2011), slip op at 4, this Court quoted Black's Law Dictionary (9th ed) for the following definition of an illusory contract:

An “illusory contract” is defined as “[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable.”

We disagree with plaintiffs that ¶ 17 renders the Cash Account Agreements illusory. The consideration for the agreements is recited in the first paragraph, which states that Baird is assuming obligations to open and operate accounts for both Kevin and Charles. Although a contract that is cancellable at will by one party can create an illusory obligation, *Lichnovsky v. Ziebart Int'l Corp.*, 414 Mich. 228, 244 n25; 324 NW2d 732 (1982), a right to amend does not render an agreement illusory when restrictions are placed on that right. In *Hardin v. First*

Cash Fin Servs, Inc., 465 F3d 470, 478–479 (CA 10, 2006), the court stated:

*5 Hardin suggests that since the contract reserves to First Cash a unilateral right to terminate or amend the DRP, the contract is illusory and, consequently, unenforceable. We are not persuaded.

The Agreement states that First Cash “retains the right to terminate the [Agreement], and/or to modify or discontinue the [DRP] .” ... However, this right is limited:

“[N]o amendment shall apply to any claims, disputes, or controversies of which the Company had actual notice on the date of the amendment, and termination of the [Agreement and/or DRP] shall not be effective until 10 days after reasonable notice of termination is given to Employee or as to claims, disputes, or controversies which arose prior to the date of termination.” ...

We have held that “an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.” *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir.2002). Here, though, First Cash's right to modify the Agreement was not unrestricted. For example, before amending or terminating the Agreement, First Cash must provide 10–days notice to its current employees. Additionally, it cannot amend the Agreement if it has actual notice of a potential dispute or claim, nor may it terminate the Agreement as to any claims which arose prior to the date of termination.

These limitations are sufficient to avoid rendering the parties' Agreement to arbitrate illusory. While “the reservation of a unilateral right to cancel [an] entire agreement is so broad as to negate the existence of any consideration in that the promise is essentially empty or illusory,” if “notice of cancellation is required the promisor is bound sufficiently so that his promise to buy or give notice of cancellation meets the requirement of consideration.” *Wilson v. Giford–Hill & Co., Inc.*, 570 P.2d 624, 626 (1977); see *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F.Supp.2d 1212, 1215 (D.Okla.2003) (applying Oklahoma law and finding an arbitration agreement enforceable that permitted the company to amend or terminate on 10–days notice); see also *In re Halliburton Co.*, 80 S.W.3d 566, 570 (Tex.2002) (finding an arbitration agreement not illusory where the employer's right to modify was restricted in cases where it had actual notice of the dispute and required 10–days notice to employees before termination).

Hardin relies on the Ninth Circuit's opinion in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir.2003), to argue that the restrictions are insufficient to save the Agreement. In *Ingle*, the defendant company's unilateral right to modify an arbitration agreement was restricted in only one respect: modifications required 30 days notice to employees. The court concluded that a 30-day "notice is trivial when there is no meaningful opportunity to negotiate the terms of the agreement." *Id.* at 1179. Finding a lack of mutuality in the right to modify, the court held that the modification provision was "substantively unconscionable." *Id.*

*6 Hardin's reliance on *Ingle* is misplaced. First, Oklahoma law suggests that reasonable modification provisions are permissible, unlike in *Ingle* where the court was applying California law. More critically, however, the *Ingle* court explicitly stated that it drew "no conclusion as to whether [the modification clause], by itself, renders the [entire arbitration] contract unenforceable," begging the question of whether the agreement was still effective. *Id.* at n. 23.

We conclude under Oklahoma law that an arbitration agreement allowing a defendant company the unilateral right to modify or terminate the agreement is not illusory so long as reasonable restrictions are placed on this right. The Agreement here satisfies Oklahoma law and is therefore enforceable. [internal citations omitted].

Here, in addition to the fact that Baird provided consideration for the Cash Account Agreements through its agreement to open and manage the accounts, Baird's right to amend was subject to it providing specified notice of its intent to amend.

Even if the agreements could be considered illusory at their inception, however, the parties' performances under the agreements preclude any claim that the agreements should be found unenforceable. Because all parties performed under the terms of the Cash Account Agreements, plaintiffs cannot now avoid the terms of those agreements on the ground that any promises made by Baird as consideration at the inception of the agreements rendered the agreements illusory when made. See, e.g., *Petersen v. West Mich. Com Mental Health*, 2010 WL 3210749, 2 (WD Mich, 2010). Accordingly, we reject plaintiffs' argument that the agreements are unenforceable.

Plaintiffs also argue that the Cash Account Agreements are no longer operable to compel arbitration because they have

terminated their relationships with Baird and, therefore, the agreements are no longer in effect. There is no merit to this argument. Whether a claim is subject to arbitration under an agreement that is no longer in effect depends on the terms of the agreement. See *Litton Fin Printing Div v. NLRB*, 501 U.S. 190, 204; 111 S Ct 2215; 115 L.Ed.2d 177 (1991). Indeed, there is a presumption that favors arbitration of matters after expiration of the agreement unless that presumption is negated expressly or by clear implication in the agreement. *Id.* Here, the arbitration agreements provide that they "shall apply to any controversy or claim or issue in any controversy arising from events that occurred prior, on, or subsequent to the execution of this Arbitration Agreement with respect to any and all Client Accounts." Because the agreements broadly express an intent for arbitration to apply to all claims relating to any client account, and there is no clear language that negates the presumption in favor of arbitration of such claims after the agreements expire, the agreements apply to plaintiffs' claims, which arose when the arbitration agreements were still in effect.

*7 In sum, the trial court properly rejected plaintiffs' argument that the arbitration agreements were not enforceable or illusory.

III. CAROL AND MARY LYNN TOBEL

Plaintiffs argue that even if the arbitration agreements are enforceable to compel arbitration of the claims of Kevin and Charles, the trial court erred in ruling that Mary Lynn and Carol were also required to arbitrate their claims, because they were not parties to the arbitration agreements. The court reasoned that because the policies were transferred to the trusts by Kevin and Charles, Carol and Mary Lynn, as trustees, were bound by the Cash Account Agreements as Kevin's and Charles's assignees pursuant to ¶ 14 of the agreements. The court further ruled that any individual claims asserted by Carol and Mary Lynn were subject to the arbitration agreements signed by Charles and Kevin because, whether sounding in tort or in contract, the claims were "totally and completely derivative of Kevin and Charles' relationship to the defendants." We agree with the trial court.

Paragraph 14 of the Cash Account Agreements provides:

14. **Successors.** The Client hereby agrees that this Agreement and all terms thereof shall be

binding upon the Client's heirs, executors, administrators, personal representatives and assigns. This Agreement shall inure to the benefit of Baird's present organization and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever.

In *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 628–629 (CA 6, 2003), the court explained that there are circumstances in which nonsignatories to an arbitration agreement may be required to arbitrate under the agreement:

[N]onsignatories may be bound to an arbitration agreement under ordinary contract and agency principles. *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir.1990). Five theories for binding nonsignatories to arbitration agreements have been recognized: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel. *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir.1995).

The court in *Thomson* held that a nonsignatory may be bound to an arbitration agreement under an estoppel theory when the nonsignatory seeks a *direct* benefit from the contract while disavowing the arbitration provision. *Id.* at 778–79. When only an indirect benefit is sought, however, it is only a signatory that may be estopped from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the underlying contract. *Id.* at 779. See *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir.2000) (nonsignatory asserting breach of contract and breach of contract claims under the contract could not avoid the arbitration agreement in the contract).

The district court rejected the estoppel argument, stating that defendants' reasoning was “circular and without merit.” It is not clear from the discussion of *Thomson*, however, whether the court found that Javitch, in asserting claims on behalf of VES and CFL, sought to benefit either directly or indirectly from the customer agreements that contained the arbitration clauses. Since this determination would be central to the question of whether to apply estoppel to bind Javitch, a nonsignatory, to the arbitration agreements, we vacate and remand for further consideration of this issue.

*8 In this case, the arbitration provisions in the Cash Account Agreements were enforceable against Carol and Mary Lynn under two theories: incorporation by reference and estoppel. The arbitration clauses specifically provide that any successors to the signatories of the agreement are also bound by it. Thus, Carol and Mary Lynn, as trustees of the signatories, were bound by the arbitration clause.

In addition, any individual claims by Carol and Mary Lynn are subject to arbitration because their claims derive directly from their husbands' relationships with Baird, which are subject to the Cash Account Agreements. Plaintiffs also concede that Carol and Mary Lynn were both signatories to the insurance policies acquired from AXA, the purchase of which was brokered by Baird. Accordingly, there is no valid reason why Carol and Mary Lynn should not be required to arbitrate their claims as well.² Although plaintiffs emphasize that Carol and Mary Lynn have asserted individual claims, plaintiffs have not shown how any of their claims are independent of Charles's and Kevin's relationships with Baird.

² Contrary to what plaintiffs argue, the trial court did not rely exclusively on *Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874 (Tx App, 1992), as support for its conclusion that Mary Lynn and Carol may be required to arbitrate their claims. Regardless, we agree that *Eddings* is consistent with this state's “strong public policy ... in favor of arbitration as a single, expeditious means of resolving disputes.” *Rooyakker & Sitz*, 276 Mich.App at 163. Further, plaintiffs' attempt to distinguish *Eddings* on the basis that it involved a settlor who gave a trustee authority to enter into arbitration agreements is unpersuasive. Plaintiffs overlook the fact that the court in that case also held that the nonsignatory trust beneficiaries were also bound to arbitrate any claims related to the trust.

We also agree that Carol and Mary Lynn are estopped from denying that the arbitration clauses apply to them. As explained in *Javitch*, 315 F.3d at 628–629, nonsignatories may be bound by an arbitration agreement based on estoppel where they are seeking a direct benefit from the contract at issue, while disavowing the arbitration provision. That is the situation in this case. Carol and Mary Lynn are asserting claims that derive directly from their husbands' interactions with Baird and AXA over the policies at issue, and those claims are subject to the Cash Account Agreements, which contain the arbitration requirement.

We reject plaintiffs' argument that the trial court's ruling, compelling Carol and Mary Lynn to arbitrate their claims, is an improper attempt to revive coverture, which has been eliminated in this state for many years. See *Canjar v. Cole*, 283 Mich.App 723, 729; 770 NW2d 449 (2009). Formerly, the "disabilities of coverture" meant that a married woman could not enter into a binding contract. *Id.* Here, however, the trial court did not compel Carol and Mary Lynn to submit their claims to arbitration on the basis of their statuses as wives of the signatories, but rather because of their statuses as successors and the derivative nature of their claims. Accordingly, there is no merit to this argument.

Plaintiffs' reliance on *Moses H Cone Mem Hosp v. Mercury Constr Corp*, 460 U.S. 1; 103 S Ct 927; 74 L.Ed.2d 765 (1983), to argue that piecemeal litigation must prevail where some claims are subject to arbitration and some are not is also misplaced. That holding only applies where there is no legal basis for compelling certain parties to submit their claims to arbitration. As previously explained, that is not the situation here. See also *Thomson-CSF, SA v. American Arbitration Ass'n*, 64 F3d 773, 776 (CA 2, 1995) (explaining that while a party generally cannot be required to submit to arbitration any dispute that he or she did not agree to so submit, it is "clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency' "), and *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624; 129 S Ct 1896, 1902–1903; 173 L.Ed.2d 832 (2009) (holding that nothing in the FAA prohibits nonparties from enforcing an arbitration agreement based on state law).

*9 For these reasons, the trial court did not err in ruling that the claims by plaintiffs Carol and Mary Lynn may be submitted to arbitration even though they are nonsignatories to the arbitration agreements with Baird.³

³ Plaintiffs also assert that Mary Lynn's signature was forged on an earlier Cash Account Agreement. However, the trial court did not rely on any purported signature on an earlier agreement to find that her claims must be submitted to arbitration. Rather, the court treated both Mary Lynn and Carol as nonsignatories to the account agreements and found that they were both still bound to arbitrate their claims. The trial court did not err in so ruling.

IV. AXA

Next, plaintiffs argue that because AXA is a nonsignatory to the Baird Cash Account Agreements, it cannot compel them to arbitrate their claims against it in the same proceedings involving Baird. The trial court disagreed, ruling:

The claims against AXA are so intertwined that they should go to arbitration. AXA is not a signatory. However, as a non-signatory AXA can submit to arbitration. AXA is [sic, was] an agent of Baird at the time that these alleged misrepresentations based upon the descriptions of cash flow through the policies because Baird selected AXA as the vehicle for the plaintiffs to purchase these policies. And when I say "plaintiffs," I mean Kevin and Charles who, I had initially started this ruling by saying clearly they must arbitrate with Baird as individuals.

As discussed in *Javitch*, 315 F3d at 628–629, an agency relationship may be a basis for requiring a nonsignatory to an arbitration agreement to also participate in arbitration. Paragraph 3 of plaintiffs' complaint alleges that Baird was acting as AXA's agent at all relevant times:

3. Defendant Robert W. Baird and Company, Incorporated ("Baird") is a foreign corporation, with agents and offices located throughout the State of Michigan. Baird, upon information and belief, is registered with the State of Michigan Office of Financial and Insurance Services to sell insurance. In addition, Baird was, at all times relevant to this Complaint, an agent of AXA and was conducting business in the County of Wayne, State of Michigan.

Plaintiffs also alleged that their financial advisor, Rex Stanczak, an employee and agent of Baird, also acted as an agent for AXA. Plaintiffs' complaint also contained allegations that AXA had not properly trained its agents in selling annuities, which extended to both Baird and Stanczak.

Because plaintiffs' own complaint alleges the existence of an agency relationship, we reject plaintiffs' argument on appeal

that there was no evidence of an agency relationship between the parties or that the trial court improperly made a finding of fact concerning the existence of an agency relationship. A party is bound by its pleadings. *Angott v. Chubb Group of Ins Cos*, 270 Mich.App 465, 470; 717 NW2d 341 (2006). The relationship between Baird and AXA, as alleged in plaintiffs' complaint, shows that plaintiffs' claims against both defendants are intertwined and based on an agency relationship.

The circumstances in which an agency relationship or "alternative estoppel" will permit a nonsignatory to compel a signatory to arbitrate claims is explained as follows in *PRM Energy Sys, Inc v. Primenergy, LLC*, 592 F.3d 830, 834–835 (CA 8, 2010):

As a starting point, we note that a nonsignatory may compel a signatory to arbitrate claims in limited circumstances. See, e.g., *Finnie v. H & R Block Fin. Advisors, Inc.*, 307 Fed. Appx. 19, 21 (8th Cir.2009) (unpublished per curiam) (compelling arbitration based on a close relationship between signatories and nonsignatories); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798–99 (8th Cir.2005) (discussed *infra*); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947–48 (11th Cir.1999) (same); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir.1995) (applying an estoppel theory based on a close relationship of parties and claims that were intertwined with contract rights and duties); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir.1993) (applying a "traditional agency theory" regarding a nonsignatory employee of a signatory); see also *Am. Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575, 579–80 (1994).

*10 In *CD Partners*, we recognized two such circumstances. See *CD Partners*, 424 F.3d at 798. The first relies on agency and related principles to allow a nonsignatory to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory, a failure to do so would eviscerate the arbitration agreement. *Id.*; see also *Nesslage v. York Secs., Inc.*, 823 F.2d 231, 233 (8th Cir.1987) (permitting a nonsignatory to compel arbitration where it was the "disclosed agent" of a signatory). The second relies loosely on principles of equitable estoppel, broadly encompasses more than one test for its application, and has been termed "alternative estoppel." *CD Partners*, 424 F.3d at 799 ("A willing nonsignatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an

alternative estoppel theory which takes into consideration the relationships of persons, wrongs, and issues ...") (quoting *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir.2003)) (alteration omitted, emphasis added). Alternative estoppel typically relies, at least in part, on the claims being so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement. See *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993) (citing with approval and adopting the reasoning of *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir.1981)).

Here, either theory, agency or alternative estoppel, is applicable to enforce AXA's request for arbitration against plaintiffs. Plaintiffs' complaint alleged concerted conduct by Baird and AXA. The complaint contained 13 different counts, each of which were alleged to be applicable to both defendants. We agree with AXA that the claims alleged against it in plaintiffs' complaint are so intertwined or coordinated with those against Baird that it was appropriate to require Kevin and Charles, as signatories to the Baird arbitration agreement, to resolve those claims in arbitration with both defendants.

Equitable estoppel also compels the conclusion that plaintiffs should be required to pursue their claims against AXA in the arbitration proceedings with Baird. This case is factually similar to *Brown v. Pacific Life Ins Co*, 462 F.3d 384 (CA 5, 2006). In *Brown*, an arbitration agreement existed between the plaintiffs and Smith Barney. *Id.* at 389–390. Nonparties to the arbitration agreement, defendants G.E. Life & Annuity Insurance Company and Pacific Life Insurance Company, moved to compel arbitration of the claims against them based on the agreement with Smith Barney. *Id.* at 390. The court, *id.* at 398–399, stated:

Provided the agreements are valid, the Browns do not dispute the arbitrability of their claims against Smith Barney. They argue, however, that the district court erred by estopping the Browns from asserting that the lack of a written arbitration agreement precluded arbitration of their claims against GE and Pacific. We review for abuse of discretion the district court's use of equitable estoppel. *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir.2000).

*11 Although arbitration is a matter of contract that generally binds only signatories, a party to an arbitration agreement may be equitably estopped from litigating its claims against non-parties in court and may be ordered to arbitration. *Id.* at 526 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999)). In *Grigson*, we held that a non-signatory to an arbitration agreement can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a non-signatory; or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract. *Id.* at 527. We reasoned that equity does not allow a party to “seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a non-signatory.” *Id.* at 528; see *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir.2004) (stating that a plaintiff should not be able to claim the benefit of a contract and simultaneously avoid its burdens). “[T]he result in *Grigson* and similar cases makes sense because the parties resisting arbitration had expressly agreed to arbitrate claims of the very type that they asserted against the nonsignatory.” *Bridas S.A.P.I.C. v. Gov’t of Turkmen.*, 345 F.3d 347, 361 (5th Cir.2003).

Although close, we conclude that the district court did not abuse its discretion in determining that the Browns were estopped under *Grigson*’s second prong from asserting that a lack of a written arbitration agreement precluded arbitration. The district court’s finding that there was no way to bring actions against GE and Pacific without considering the actions of Smith Barney and Patrick Holt, is not patently incorrect.¹⁰ Whether and how GE and Pacific defrauded or breached duties owed to the Browns depends, in some part, upon the nature of tortious acts allegedly committed by Holt and Smith Barney—acts that would be covered by the arbitration agreement—as well as any tortious acts by GE and Pacific. See *Hill v. GE Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir.2002) (finding no abuse of discretion where a plaintiff alleges “interdependent and concerted misconduct,” while

denying that its claims are intertwined with an agreement containing an arbitration clause). As the Browns fail to allege tortious acts by GE and Pacific that are separate and apart from Holt’s, we can only conclude that the complaint asserts concerted misconduct by all parties. “To constitute an abuse of discretion, the district court’s decision must be either premised on an erroneous application of the law, or on an assessment of the evidence that is clearly erroneous.” *Grigson*, 210 F.3d at 528. “By this measure the district court did not abuse its discretion.” *Hill*, 282 F.3d at 349.

10

The Browns’ claims against Pacific and GE sound in fraud, negligence, and breach of various common law and statutory duties. They allege that, through Holt as their agent, those entities: (1) misrepresented facts and insurance policy provisions to obtain an unjust advantage; (2) failed to disclose that the Browns were purchasing a variable annuity; and (3) misrepresented that the investment plan met the needs of Lonnie and Netty Brown. They also allege that GE and Pacific negligently conferred powers of agency and failed to properly train and supervise Holt.

*12 Here, because plaintiffs’ complaint raises allegations of substantially interdependent and concerted misconduct by both Baird and AXA, plaintiffs are equitably estopped from arguing that their claims against AXA should not be subject to arbitration.

Plaintiffs also appear to argue that a theory of estoppel cannot be used to compel Mary Lynn and Carol to arbitrate their claims against AXA because estoppel cannot be used to compel arbitration between two nonsignatories to an arbitration agreement. Plaintiffs cite no authority for this position. As explained previously, Mary Lynn and Carol properly may be compelled to arbitrate their claims under state contract and agency principles.

Accordingly, the trial court did not err in ruling that plaintiffs’ claims against AXA were also subject to arbitration.

Affirmed.

All Citations

Not Reported in N.W.2d, 2012 WL 555801

EXHIBIT J

12-6-13

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

NEXTEER AUTOMOTIVE, a Delaware
corporation,

Plaintiff,

v.

Case No. 13-021401-CK-1

JUDGE M. RANDALL JURRENS

MANDO AMERICA CORPORATION, a
Michigan corporation, TONY DODAK, an
Individual; ABRAHAM GEBREGERGIS, an
Individual; RAMAKRISHNAN
RAJAVENKITASUBRAMONY, an
Individual; CHRISTIAN ROSS, an
Individual; KEVIN ROSS, an Individual;
TOMY SEBASTIAN, an Individual;
THEODORE G. SEEGER, an individual;
TROY STRIETER, an Individual; JEREMY
J. WARMBIER, an Individual; and SCOTT
WENDLING, an Individual; jointly and
severally,

Defendants.

A TRUE COPY
Susan Kaltenbach, Clerk

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and STONE, P.L.C.
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FILED
SAGINAW COUNTY, MICH
2013 DEC 6 PM 4 28
BY CLERK
SUSAN KALTENBACH
CLERK

There is no other pending or other civil action arising out of the transaction occurrence alleged in the complaint.

This case meets the statutory requirements to be designated as a Business Court case in accordance with MCR 2.112(O).

Jerome R. Watson
Jerome R. Watson (P27082)

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiff, Nexteer Automotive Corporation, states for its Complaint against Mando America Corporation, Tony Dodak, Abraham Gebregergis, Ramakrishnan Rajavenkitasubramony, Christian Ross, Kevin Ross, Tomy Sebastian, Theodore Seeger, Troy Strieter, Jeremy Warmbier, and Scott Wendling ("Dodak", "Gebregergis", "Rajavenkitasubramony", "C. Ross", "K. Ross", "T. Sebastian", "Seeger", "Strieter", "Warmbier", and "Wendling", or referenced collectively as the "Individual Defendants"), as follows:

PARTIES

1. Plaintiff, Nexteer Automotive Corporation ("Nexteer"), is a Delaware corporation with its headquarters in Saginaw, Michigan. Nexteer is a global leader in advanced steering and driveline systems, particularly for the automotive industry.
2. Mando America Corporation ("Mando"), is a Michigan Corporation with facilities in Bay City and Novi, Michigan. Mando manufactures brake, steering and suspension systems,
3. Upon information and belief, Defendant Dodak is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.
4. Upon information and belief, Defendant C. Ross is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.
5. Upon information and belief, Defendant Seeger is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.
6. Upon information and belief, Defendant K. Ross is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.

7. Upon information and belief, Defendant Gebregergis is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.

8. Upon information and belief, Defendant Rajavenkitasubramony is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.

9. Upon information and belief, Defendant Strieter is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.

10. Upon information and belief, Defendant Sebastian is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.

11. Upon information and belief, Defendant Warmbier is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.

12. Upon information and belief, Defendant Wendling is an individual who resides and/or conducts business in Saginaw County, Michigan and is currently employed by Mando.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Mando pursuant to MCL 600.711 and 600.715.

14. This Court has jurisdiction over Dodak, Gebregergis, Rajavenkitasubramony, C. Ross, K. Ross, T. Sebastian, Seeger, Strieter, Warmbier, and Wendling pursuant to MCL 600.701 and 600.705.

15. This Court has subject matter jurisdiction over this action because it is equitable in nature and the amount in controversy exceeds \$25,000, exclusive of interest and costs.

16. Venue is proper pursuant to MCL 600.1621.

INTRODUCTION

17. Headquartered in Saginaw, Michigan, Nexteer employs approximately 8,000 individuals and has over 50 global customers including General Motors, Ford, Chrysler, Fiat, Toyota, PSA Peugeot Citroen and manufacturers in India, China and South America.

18. Nexteer's global reach spans every major region of the world and includes 19 manufacturing plants, 5 regional engineering centers, 10 customer service centers, and 3 vehicle performance centers.

19. Nexteer and its predecessor companies (referenced herein as "Nexteer") have a 100 year history of innovation and excellence in the steering systems area.

20. In 1906 Nexteer's predecessor was founded as Jackson, Church and Wilcox Company. In 1909, the Jackson, Church and Wilcox business was purchased by Buick, which was owned by General Motors. In 1917, the company became the first automotive parts manufacturing division of GM engaged in steering systems research, design and manufacturing.

21. More recently, in 1998, General Motors created Delphi Corporation, primarily as an automotive components business under General Motors, and the steering operations became a major business division under Delphi Corporation. In 1999, Delphi was spun off by General Motors to become an independent publicly-held corporation. In 2009, Delphi Corporation's global steering operations were sold to General Motors and subsequently renamed Nexteer Automotive. In 2010 General Motors sold Nexteer Automotive to China-based Pacific Century Motors, a current owner of Nexteer, for \$465,000,000.

22. Over the many decades of its existence, Nexteer and its predecessors have demonstrated innovation and excellence in the steering systems area, introducing advances into the marketplace such as Saginaw Safety Power Steering, the tilt-wheel steering column, the anti-

theft steering column, the rack and pinion steering system, and the Delphi Electronic Power Steering System.

23. One of the keys to Nexteer's continuing success in selling its steering systems to automotive manufacturers is Nexteer's EPS System ("EPS"). EPS is the result of decades of research, development and expenditure. The system results in reduced gas emissions, better mileage, and quieter performance. The power and brains of EPS is the Modular Power Pack ("MPP") which is a subsystem of the whole EPS product.

24. EPS and MPP give Nexteer a competitive advantage over competing steering system manufacturers such as Defendant Mando, allowing Nexteer to prosper.

25. The development of EPS and MPP is due in large part to Nexteer's Future Engineering Group, where much research and development takes place. The key portion of the Future Engineering Group is the Modular Power Pack Section where Nexteer's MPP is continually being refined and improved.

26. To protect these systems and other confidential information, Nexteer requires its employees to sign employment agreements through which the employees acknowledge that they may become privy to trade secret and confidential/proprietary information, agree not to disclose any of the information to any person or entity, and admit that such disclosure could cause irreparable harm. In addition, the employees agree that for a period of one year after they leave Nexteer's employ, they will not directly or indirectly induce any Nexteer employee to participate with the departed employee on any future business venture. Nexteer, on occasion confirms these agreements in writing through a letter sent to the employees.

27. All of the Individual Defendants are former Nexteer employees who had access to confidential/proprietary information regarding the EPS and MPP systems. Each played an

important role in the MPP Section of the Future Engineering Group, and each of these Individual Defendants abruptly and without notice left Nexteer's employment over a 10 day period in September, 2013 and immediately began working for Mando. They are now in a position to disclose highly confidential/proprietary information and trade secrets to Nexteer's competitor, Defendant Mando, and thus destroy the competitive advantage that has taken Nexteer decades to secure. Further, their mass departure from Nexteer has effected a transfer of Nexteer's MPP Section to Mando.

28. Founded in 1996, Mando America Corporation is a fully owned subsidiary of Mando Corporation, a Korean company which is headquartered in Seoul, Korea, has nearly 10,000 employees, and has facilities around the world.

29. Nexteer seeks injunctive relief to prevent immediate and substantial and, indeed, irreparable harm, including but not limited to the loss of its confidential and proprietary information, key employees, clients, goodwill, and trade secrets.

FACTS

30. Due in large part to its proprietary and confidential EPS and MPP systems and the performance of its Future Engineering Group, Nexteer is a global leader in advanced steering systems and driveline systems.

31. Nexteer's in-house development and integration of hardware, software and electronics gives the company an unmatched competitive advantage as a full service steering supplier. As a result of its hundred year heritage of vehicle integration and expertise and product workmanship, Nexteer has a strong foundation and a reputation for providing dependable steering solutions and fostering enduring customer relationships. Through the continual

improvements, innovations, and upgrades to its EPS and MPP systems as a result of the efforts of its Future Engineering Group, Nexteer has been able to maintain this advantage.

32. EPS is the connection point between car and driver. It provides the feel of the road and plays a key role in the vehicle's personality and performance. In addition to reduced gas omissions, customers benefit from a simplified manufacturing process that reduces proliferation, and a single mechanism design that reduces OEM assembly time. The key to the EPS system is the Modular Power Pack which both controls and powers the system.

33. The EPS System is a green technology that offers automakers increased fuel economy. Since 1999 Nexteer has put more than 20 million EPS units on the road, saving more than 20 billion gallons of fuel.

TEN KEY ENGINEERS ABRUPTLY LEAVE NEXTEER TO WORK AT MANDO

34. The ten Individual Defendants were all employed by Nexteer as engineers and all worked in key areas where they obtained knowledge and familiarity with Nexteer's EPS, MPP and/or other systems.

A. Kevin C. Ross

35. On or about March 27, 1986, Defendant K. Ross, an engineer, began working for Nexteer. A high level engineering manager at Nexteer, K. Ross had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 5, 2013. As the Product Line Executive of Global Steering Systems, K. Ross was one of Nexteer's foremost experts on Nexteer's EPS System and was one of the designers of Nexteer's Modular Power Pack.

36. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had K. Ross sign an employment

agreement which, among other features, included language protecting Nexteer's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by K. Ross during his Nexteer employment remained the property of Nexteer. The employment agreement also secured K. Ross' promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the Agreement was confirmed in principal part by Nexteer's letter to K. Ross.

37. Upon information and belief, K. Ross currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

B. Tony Dodak

38. On or about June 16, 1994, Defendant Dodak, another of Nexteer's high level engineering managers, began working for the Company. As a result of his duties at Nexteer, Dodak had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 4, 2013. As Nexteer's Chief Product Engineer, Dodak was one of Nexteer's foremost experts on its EPS System, including the Modular Power Pack.

39. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had Dodak sign an employment agreement which, among other features, included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Dodak during his Nexteer employment remained the property of Nexteer. The employment

agreement also secured Mr. Dodak's promise that for a period of twelve months following his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Dodak.

40. Upon information and belief, Dodak currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

C. Abraham Gebregergis

41. On or about January 2, 2008, Defendant Gebregergis, an engineer, began working for Nexteer. As a result of his duties at Nexteer, as explained below, Gebregergis had access to proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 11, 2013.

42. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had Gebregergis sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Gebregergis during his Nexteer employment remained the property of Nexteer. The employment agreement also secured Mr. Gebregergis' promise that for a period of twelve months following his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Gebregergis.

43. Upon information and belief, Gebregergis currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

D. Ramakrishnan Rajavenkitasubramony

44. On or about December 17, 2007, Defendant Rajavenkitasubramony, an engineer, began working for Nexteer. As a result of his duties at Nexteer, Rajavenkitasubramony had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 11, 2013.

45. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had Rajavenkitasubramony sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Rajavenkitasubramony during his Nexteer employment remained the property of Nexteer. The employment agreement also secured Rajavenkitasubramony's promise that for a period of twelve months following his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Rajavenkitasubramony

46. Upon information and belief, Rajavenkitasubramony currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

E. Christian Ross

47. On or about December 9, 1990, Defendant C. Ross, an engineer, began working for Nexteer. A high level engineering manager at Nexteer, C. Ross had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 4, 2013. As Nexteer's Staff Engineering Manager in charge

of Future Engineering, C. Ross was one of Nexteer's foremost experts on Nexteer's EPS System and was one of the designers of Nexteer's Modular Power Pack.

48. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had C. Ross sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by C. Ross during his Nexteer employment remained the property of Nexteer. The employment agreement also secured C. Ross's promise that for a period of twelve months following his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to C. Ross

49. Upon information and belief C. Ross currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

F. Tomy Sebastian

50. On or about January 6, 1992, Defendant Sebastian, an engineer, began working for Nexteer. As a result of his duties at Nexteer, as further explained below, Sebastian had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 4, 2013. As the Electrical Hardware/Electrical Magnetics expert on the Future Engineering Team Sebastian occupied a key position at Nexteer.

51. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its

clients and/or employees, on October 7, 2009, Nexteer had Sebastian sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Sebastian during his Nexteer employment remained the property of Nexteer. The employment agreement also secured Mr. Sebastian's promise that for a period of twelve months following his voluntary termination from employment, he would not induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Sebastian.

52. Upon information and belief, Sebastian currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

G. Theodore G. Seeger

53. On or about June 17, 1968, Defendant Seeger, an engineer, began working for Nexteer. As a result of his duties at Nexteer, Mr. Seeger, Executive Director, Advanced Manufacturing Strategies and one of Nexteer's foremost experts on the EPS and MPP Ssystems, had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 5, 2013.

54. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had Seeger sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Seeger during his Nexteer employment remained the property of Nexteer. The employment agreement

also secured Mr. Seeger's promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Seeger.

55. Upon information and belief, Seeger currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

H. Troy Strieter

56. On or about March 16, 1997, Defendant Strieter, an engineer, began working for Nexteer as a Project Engineer. As a result of his duties at Nexteer, Strieter had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 12, 2013.

57. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had Strieter sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Strieter during his Nexteer employment remained the property of Nexteer. The employment agreement also secured Mr. Strieter's promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Strieter.

58. Upon information and belief, Strieter currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

I. Jeremy J. Warmbier

59. On or about June 26, 2000, Defendant Warmbier, an engineer, began working for Nexteer. As a result of his duties at Nexteer, Warmbier had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 13, 2013.

60. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had Warmbier sign an employment agreement which among other features included language protecting Nexteer's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Warmbier during his Nexteer employment remained the property of Nexteer. The employment agreement also secured Mr. Warmbier's promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Warmbier.

61. Upon information and belief, Warmbier currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

J. Scott Wendling

62. On or about May 5, 1995, Wendling, an engineer, began working for Nexteer. As a result of his duties at Nexteer, Wendling had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 13, 2013.

63. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had Wendling sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The agreement made it clear that all writings, designs, developments, works and/or inventions (collectively "creations") made by Wendling during his Nexteer employment remained the property of Nexteer. The employment agreement also secured Mr. Wendling's promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him. On or about September, 2010, the agreement was confirmed in principal part by Nexteer's letter to Wendling

64. Upon information and belief, Wendling currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

OTHER ENGINEERS LEAVE NEXTEER TO WORK AT MANDO

65. On or about August 1, 2011, Mazin-James Khlaif ("Khlaif"), an engineer, began working for Nexteer. A member of the MPP Section of the Future Engineering Group, Khlaif had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 17, 2013.

66. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on August 1, 2011, Nexteer had Khlaif sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The employment agreement also secured Mr. Khlaif's

promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him.

67. Upon information and belief, Khlaif currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

68. On or about October 18, 2010, Shakil Hossain ("Hossain"), an engineer, began working for Nexteer. A member of the MPP Section of the Future Engineering Group, Hossain had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on September 30, 2013.

69. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 18, 2010, Nexteer had Hossain sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The employment agreement also secured Mr. Hossain's promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him.

70. Upon information and belief, Hossain currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

71. On or about October 3, 2011, Mazharul Chowdhury ("Chowdhury"), an engineer, began working for Nexteer. A member of the MPP Section of the Future Engineering Group, Chowdhury had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on October 8, 2013.

72. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 3, 2011, Nexteer had Chowdhury sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The employment agreement also secured Mr. Chowdhury's promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him.

73. Upon information and belief, Chowdhury currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

74. On or about April 18, 2011, Suhas Jagtap ("Jagtap"), an engineer, began working for Nexteer. A member of the MPP Section of the Future Engineering Group, Jagtap had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until his abrupt resignation on October 17, 2013.

75. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on April 18, 2011, Nexteer had Jagtap sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The employment agreement also secured Mr. Jagtap's promise that for a period of twelve months after his voluntary termination from employment, he would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with him.

76. Upon information and belief, Jagtap currently is employed by Mando in a similar capacity to that in which he worked for Nexteer.

77. On or about January 6, 1992, Reeny Sebastian ("R. Sebastian"), an engineer, began working for Nexteer. As a result of her duties at Nexteer, R. Sebastian had access to Nexteer's proprietary and confidential business information and trade secrets. This access continued until her abrupt resignation on October 17, 2013.

78. Recognizing Nexteer's interest in safeguarding its proprietary and confidential information and trade secrets and protecting itself from unfair competition and solicitation of its clients and/or employees, on October 7, 2009, Nexteer had R. Sebastian sign an employment agreement which among other features included language protecting the company's trade secrets and other confidential/proprietary information. The employment agreement also secured Ms. R. Sebastian's promise that for a period of twelve months after her voluntary termination from employment, she would not induce or attempt to induce any Nexteer employee to leave Nexteer's employ to work with her.

79. Upon information and belief, R. Sebastian currently is or will be employed by Mando in a similar capacity to that in which she worked for Nexteer.

80. Since R. Sebastian's departure two additional engineers from the MPP Section of the Future Engineering Group, Mohammed Islam and Santhosh Veigas, have abruptly resigned from Nexteer and, upon information and belief, commenced employment with Mando.

**NEXTEER'S STATE OF THE ART ELECTRIC POWER
STEERING SYSTEM (EPS) IS A KEY TO NEXTEER'S SUCCESS**

81. Nexteer is a Tier 1 supplier to the auto industry. Mando is also a Tier 1 supplier to the auto industry. Both Nexteer and Mando engage in the development, production and sale of electric power steering products.

82. Prior to the rise of EPS technology, power steering in the automotive industry was accomplished through hydraulics, relying upon high-pressure fluids.

83. Electric power steering utilizes an electric motor and computerized controller to enable the driver to turn the wheel of a car more easily. Electric power steering permits a high degree of steering customization, as the computerized nature of the system permits companies like Nexteer to program or tune the EPS system to give drivers a specific feel as they drive and turn the vehicle. In addition, EPS takes up less space, is more environmentally-friendly, is more customizable and is more fuel-efficient than the hydraulic systems. It was through the efforts of its Future Engineering Group that Nexteer was able to develop and refine its EPS system.

84. While Nexteer was one of the originators of electric power steering systems and has long utilized it in its steering systems, Mando has much more recently began to employ electric power steering in its steering systems.

85. Twenty five (25) full-time employees work in Nexteer's EPS lab. EPS is a crucial technology for Nexteer and is responsible for a large share of Nexteer Automotive's revenues.

86. The federal government drives fuel-economy standards that OEM's must meet. EPS assists OEMs in meeting fuel-economy standards because it is more efficient. EPS only draws energy from the motor when a vehicle's steering wheel is turned. Non-EPS systems draw energy at all times, even when the steering system is not actively being used.

87. Christian Ross, Kevin Ross, Theodore (Ted) Seeger, Tony Dodak, and Tomy Sebastian were assigned to, and paid by, Nexteer Automotive to develop and improve Nexteer's EPS system. They were instrumental in developing this technology for Nexteer and, thus, were key Nexteer employees.

88. Christian Ross was the manager of Nexteer's Future Engineering Group. In this endeavor he was assisted by Tomy Sebastian who was the Electrical Hardware/Electrical Magnetics expert on the Future Engineering Team. Together they led the Group which worked on the most advanced technologies that Nexteer Automotive was pursuing.

89. Ted Seeger was the former Chief Engineer of EPS, and was heavily involved in technology selection for EPS and all of the development activities.

90. Kevin Ross was the manager for the Column EPS Engineering Team, and in that role had knowledge of all Nexteer EPS development projects. In his most recent role at Nexteer, Ross had access to all engineering fundamentals and was key in deciding what technologies Nexteer focused on and sold to its customers.

91. Tony Dodak was the Chief Product Engineer.

92. Nexteer's EPS, and the way its components and software are put together, programmed and tuned, are unique in the marketplace. No other company has been able to achieve the same level of integration of its systems as Nexteer. Nexteer developed this unique combination through decades of research, development, investment, trial and error, creative effort and expense. Much of this work was done in the Future Engineering Group and in particular, the MPP Section of that Group.

93. None of Nexteer's competitors have been able to obtain the volume of steering business from General Motors, Ford and Chrysler within the large vehicle segment in North

America as Nexteer. Further, none have been able to put EPS products in the marketplace that possess the same balance of performance and cost.

94. Through its Future Engineering Group Nexteer has been able to create an environment conducive to the development and refinement of its products. Although many entities have research and development operations, the Nexteer personnel, monetary investment, layout, and length of operation have combined to create a vehicle for developing a superior product.

95. To enable its engineers to easily locate and work on Nexteer Automotive engineering designs, drawings and software, Nexteer maintains all of its proprietary engineering information on a system called Team Center. Team Center also contains Nexteer's most highly valued proprietary information: its source code. Nexteer's source code is essentially detailed instructions on how to build, combine and tune all of Nexteer's products, including, but not limited to, EPS.

96. Engineers assigned to work on a particular project may access and check out source code, relevant designs, drawings and software located on Team Center. Non-engineers are not allowed to access this system, nor are they permitted to view or access the source code.

97. Nexteer Automotive's EPS System and other technologies are proprietary and are not generally known to the public or to Nexteer's competitors.

98. Nexteer takes many steps to protect this confidential, proprietary and trade secret information from disclosure. These steps include:

- (a) requiring all employees to sign employment agreements that bar them from using or disclosing Nexteer's proprietary, confidential and trade secret information to the general public or its competitors;
- (b) monitoring its employees to ensure they comply with their obligations set forth in employment agreements;

(c) prohibiting Nexteer employees who do not work on Nexteer engineering technology from accessing or viewing that technology and related source code;

(d) maintaining and enforcing policies prohibiting the giving of source code to Nexteer Automotive's customers; and

(e) making sure that third parties who are permitted to come on-site at Nexteer's world headquarters in Saginaw are not allowed to view or access any confidential, proprietary and trade secret information, including but not limited to source code.

THE INDIVIDUAL DEFENDANTS HELD KEY POSITIONS AT NEXTEER

99. Between September 4, 2013 and September 13, 2013, ten (10) key engineering employees suddenly resigned from Nexteer Automotive and announced they had accepted other employment. These former employees are the Individual Defendants.

100. All ten either worked directly on Nexteer's EPS System and/or the software controlling that system or worked on the Future Engineering team, which is responsible for improving Nexteer's existing products and creating new products to sustain Nexteer's viability into the future.

101. All ten employees held key positions at Nexteer.

Tony Dodak was the Chief Product Engineer;

Christian Ross was the Staff Engineering Manager in charge of Future Engineering;

Kevin Ross was the Product Line Executive – Global Steering Systems;

Ted Seeger was Executive Director, Advanced Manufacturing Strategies;

Tomy Sebastian was the Electrical Hardware/Electrical Magnetics expert on the Future Engineering team;

Troy Strieter was an Engineering Manager working directly under Tony Dodak;

Scott Wendling was an Engineering Manager, Software;

Jeremy Warmbier was a Senior Product Engineer working under Scott Wendling;

Ramakrishnan Rajavenkitasubramony was a Motor Controls engineer working on the Future Engineering team under Christian Ross; and

Abraham Gebregergis was an Electrical Hardware and Electromagnetic Engineer, reporting to Tomy Sebastian.

102. Seven additional engineers, Mazin-James Khlaif, Shakil Hossain, Mazharul Chowdhury, Suhas Jagtap, Reeny Sebastian, Mohammed Islam, and Santhosh Veigas, also left Nexteer, presumably to work at Mando.

103. All ten (10) Individual Defendants had access to Nexteer's source code, EPS technology, designs, drawings and other confidential, proprietary and trade secret information. They also had access to Nexteer's supplier pricing, customer contacts, product pricing and the terms and conditions of Nexteer's work for various customers. In short, these former employees have all the knowledge necessary to bring Nexteer Automotive's competitors on level terms with Nexteer.

104. If Nexteer Automotive's EPS technology, source code, or other confidential, proprietary and trade secret information were to be leaked to Nexteer's competitors, Nexteer's competitive advantage in the marketplace could be severely weakened or destroyed. Further, Nexteer's viability, and the jobs of its 8,000 employees, would be placed at risk. Similarly, if the Defendants are allowed to decimate the MPP Section of Nexteer's Future Engineering Group and convert it to their own use, Nexteer's competitive advantage would be severely impacted, if not destroyed.

THE TEN INDIVIDUAL DEFENDANTS ABRUPTLY RESIGN

105. Nearly all of the Individual Defendants resigned their employment in the same manner. Typically, an employee who wants to resign first notifies his or her manager, and the manager in turn informs the Human Resources Department. The manager and Human Resources Department then communicate with the resigning employee to ascertain the employee's last day

of employment, as well as a plan to handle the transition of work from the resigning employee to employees who remain employed at Nexteer.

106. Most employees who resign provide Nexteer Automotive with a notice period, within which the resigning employee can complete the handover of their tasks to others, so the company is not unduly disadvantaged by the resignation. On the employee's last day of work, the Human Resources Department completes an exit interview with the resigning employee, both to determine the factors that led the employee to resign, as well as to ensure that the employee has returned all Company property.

107. It is highly unusual, and, upon information and belief, unprecedented at Nexteer, for ten (10) employees working in the same department to resign within a ten (10) day period.

108. The exit interviews of Christian Ross and Tomy Sebastian were conducted on September 4, 2013, the day they resigned from Nexteer. Ross and Sebastian did not first inform their manager of their resignations. Instead, both employees delivered their resignations to Human Resources and indicated that they were resigning with immediate effect, and with no notice period. Neither Ross nor Sebastian told Human Resources the identity of their new employer.

109. Sebastian, the first employee to deliver his resignation, commented to the Human Resources representative that his new employer provided him with a 90% pay increase, that the new employer had pursued him and asked him to leave Nexteer, and that "this might be a busy day for you."

110. Immediately after Sebastian left the Human Resources representative's office, Christian Ross entered and tendered his resignation, effective immediately. Ross claimed that he did not have another job lined up at the time of his resignation.

111. Tony Dodak also resigned his Nexteer Automotive employment with immediate effect on September 4, 2013. As with the other resignees, Dodak delivered his resignation directly to Human Resources, bypassing his manager.

112. On September 5, 2013, Kevin Ross – Christian Ross's brother – and Ted Seeger tendered their immediate resignations to the Human Resources Department. Like Tomy Sebastian, Tony Dodak and Christian Ross, Kevin Ross and Ted Seeger also failed to notify their managers of their resignation prior to delivering it to the Human Resources Department. Ross informed Human Resources that he was not taking any time off before starting with his new employer, but refused to disclose the name of his new employer.

113. On September 11, 2013, seven days after Kevin Ross and Ted Seeger resigned from Nexteer, Ramakrishnan Rajavenkitasubramony and Abraham Gebregergis resigned their Nexteer employment without warning, and with immediate effect. Ramakrishnan Rajavenkitasubramony worked for Christian Ross in Future Engineering, while Gebregergis reported to Tomy Sebastian. Like the other employees who had resigned up to that point, Rajavenkitasubramony and Gebregergis did not provide prior notice to their managers, and went directly to Human Resources to submit their resignations.

114. On September 12, 2013, Troy Strieter resigned his Nexteer employment. He had been supervised by Tony Dodak.

115. Two more Nexteer Automotive engineers resigned on September 13, 2013 – Scott Wendling and Jeremy Warmbier. While at Nexteer Automotive, Warmbier reported to Wendling.

116. A number of other Nexteer engineers have resigned and, upon information and belief, have commenced employment at Mando. On September 17, 2013, Mazin-James Khlaif, a

Systems Engineer resigned. On September 30, 2013, Shakil Hossain, a Systems Engineer resigned. On October 8, 2013, Mazharul Chowdhury, an Electrical Engineer resigned. On October 17, 2013, Suhas Jagtap, a Controls Engineer, and Reeny Sebastian, an Engineering Supervisor, resigned.

All Ten Of The Individual Defendants Had Employment Agreements With Nexteer

117. All of the Individual Defendants signed employment agreements with Steering Solutions Services Corporation. Steering Solutions Services Corporation had its name changed to Nexteer on March 24, 2010. These employment agreements contain language stating that the employee may not discuss or disclose any Nexteer trade secrets or proprietary information and prohibiting employees from directly or indirectly inducing Nexteer Automotive employees from leaving their employment:

I acknowledge that I am, or may become, privy to trade secrets or other confidential/proprietary information concerning Steering Solutions Services Corporation, its subsidiaries and/or affiliates, the disclosure of which will cause irreparable harm. I agree to not discuss or disclose to any person or entity any trade secret or confidential/proprietary information and, upon termination of employment, shall return such information to Employer. In addition, I agree that for a period of 12 months following voluntary termination of employment, I will not, directly or indirectly, knowingly induce any Steering Solutions Services Corporation employees to leave their employment for participation, directly or indirectly, with any existing or future business venture associated with me.

These 10 agreements are attached as Exhibit 1.

118. In addition, each of the employees agreed that any writing, design, work, invention, development, etc. conceived or made during their Nexteer employment would be the property of Nexteer:

I further agree that in consideration for compensation paid by Steering Solutions Services Corporation or one of its affiliates, all writings, designs, developments, works and inventions

(collectively creations), that are conceived or made by me during the term of my employment and are related to Steering Solutions Services corporation's business will be promptly disclosed to Steering Solutions Services Corporation by me and are the property of Steering Solutions Services Corporation or its designee. I hereby assign to Steering Solutions Services Corporation all such creations. I also agree that upon request by Steering Solutions Services Corporation any time during or after the period of employment, and at the expense of Steering Solutions Services Corporation, I will assist in filing or executing any documents that Steering Solutions Services Corporation may consider necessary or helpful for the application and prosecution of intellectual property registrations related to such creations.

Mando Encouraged And Helped Facilitate Breaches By The Individual Defendants Of Their Employment Agreements In A Continuing And Orchestrated Effort To Secure Nexteer's Confidential/Proprietary Information And Trade Secrets And To Supplant Nexteer In The Market Place

119. The abrupt resignations of the ten key engineering employees and their immediately starting work at Mando, indicate that their resignations were effected in a coordinated well-planned manner.

120. Upon information and belief, Defendant Mando and various Individual Defendants collaborated to entice Nexteer employees to resign from Nexteer, accept employment at a much higher wage at Mando, and provide Mando with the necessary knowledge and information to either copy Nexteer products or manufacture products competitive to Nexteer.

121. Nexteer has reviewed the Monster.com website and observed the presence of more than a dozen job ads seeking individuals with an engineering background to work in a new Research and Development facility located in Bay City, Michigan. These ads are reflected in the documents attached as Exhibit 2. The ads seek employees to fill jobs such as "Circuit Board Layout Designer," "Software Tools and Development Engineer," "Controls Engineer," and "Mechanical Integration Engineer."

122. Clicking on any of the job ads yields a more descriptive document that sets forth the necessary qualifications, states that the prospective employer is an "Automotive Tier 1 Supplier," and also notes "This is a time sensitive search. Hiring will be immediate upon completion of interview if you possess the background and skills that matches one of the openings." This document is attached as Exhibit 3.

123. Many of the job descriptions attached to these ads are a precise fit for either the Nexteer Automotive engineering employees who resigned between September 4, 2013 and October 17, 2013, or for existing Nexteer Automotive engineers.

124. Upon information and belief, with Mando's encouragement, a number of the Individual Defendants have taken Nexteer's confidential and proprietary documents, trade secrets, and other Nexteer property to wrongfully utilize it for Mando's benefit.

125. Following Dodak's resignation, Nexteer became aware of the apparent taking of confidential information from his office.

126. During 2013, Dodak moved from his old office into his new office in the Nexteer World Headquarters in Saginaw, Michigan. During that move, Dodak's files were placed into his file cabinets in his new office.

127. Dodak maintained an archive of stenographic notebooks containing his to-do lists, observations, meeting notes, business plans, costs and pricing information. Much of this information related to Nexteer Automotive's Electronic Power Steering program. The archive of stenographic notebooks was moved into Dodak's new office.

128. Dodak also maintained three large file drawers full of engineering data for the various projects he worked on at Nexteer. These documents also were moved into the file cabinets in Dodak's new office.

129. Because the information contained in the documents in Dodak's new office, including the three large file drawers and archive of stenographic notebooks, is confidential and proprietary, Dodak locked his office door each night.

130. In the process of cleaning out Dodak's office after his resignation, Nexteer noticed that the three large file drawers, which were previously filled with documents regarding the projects Dodak worked on, were empty. Nexteer also ascertained that Dodak's archive of stenographic notebooks was missing from his office.

131. Upon information and belief, Mr. Dodak took this information with him and has used, is using, or is preparing to use it in his employment with Mando.

132. The taking of Nexteer's proprietary/confidential information and trade secrets by multiple of the Individual Defendants is well known and, indeed, in pre-suit discussions, has been admitted by Mando.

133. Mando Corporation's Bay City, Michigan facility is located only a short distance from Nexteer Automotive's Saginaw, Michigan plant, where the recently-departed Nexteer Automotive employees worked for many years prior to resigning.

Mando and Nexteer Enter Into a Non-Disclosure Agreement

134. Despite being competitors, from April 2013 to August 2013, Mando America Corporation and Nexteer Automotive actively considered the possibility of supplying components and subassemblies to one another for the purpose of jointly selling products to auto manufacturers. This consideration involved Nexteer Automotive's MPP – motorized power pack. Under the proposed arrangement with Mando, Nexteer would basically insert its sophisticated MPP system into Mando's steering system to upgrade that system's performance.

135. Prior to beginning this consideration, Nexteer required Mando to sign a Non-Disclosure Agreement ("NDA"). The NDA is attached as Exhibit 4. It required Mando to use

all information to which it gained access solely for the purpose of considering the possibility of supplying components and subassemblies, and for no other purpose. The Agreement also required Mando to destroy or return all data given to it by Nexteer. The agreement also provided that Nexteer would make similar commitments to Mando.

136. Under the NDA, Mando was identified as "a developer, manufacturer and supplier of systems and components for the global automotive industry", while Nexteer was identified as "a developer, manufacturer and distributor of advanced steering and driveline systems."

137. The defined purpose of the NDA was to explore the "possibility of supplying components and sub-assemblies to each other ("purpose").

138. The two parties to the agreement (who are referred to as partners) made it clear that the information exchanged by the two companies would be treated with the utmost confidentiality.

To establish and implement this business relationship, the contract parties have exchanged and will exchange information moving forward, including documents and samples containing knowledge which is not in the public domain, including patentable inventions. Further, it is the Partners intention that the terms and conditions of this Non-Disclosure Agreement and obligations of confidentiality apply retroactively to all INFORMATION (as defined below) exchanged between the Partners from the date of 1 June 2012 through and until the date set forth in Par. 7 below. To preclude misuse, the following is agreed:

INFORMATION: All specimens, prototypes, drawings, documents, information and/or knowledge, technological, electronically or digital data, process or materials know-how as well as information on customers, suppliers and order volumes, which are made accessible to the receiving Partner or to which the receiving Partner gains otherwise access or which the receiving PARTNER has received since 1 June 2012 – whether in written, oral or any other form – are hereinafter referred to as "INFORMATION".

1. Each Partner acknowledges that all rights to all INFORMATION made accessible to him by the disclosing Partner shall remain with the disclosing Partner.

2. The receiving Partner is obligated to treat all INFORMATION disclosed to him by the disclosing Partner or to which he gains access both prior to and during the term of this Non Disclosure Agreement under strictest confidentiality and not to make it accessible to third parties either directly or indirectly. The disclosing Partner retains any and all rights to this INFORMATION (including copyrights and the right to apply for industrial property rights such as patents, utility models, etc.)

The Partners are further obligated to use all INFORMATION to which they gains access or become aware of on the basis of this Agreement exclusively for the agreed Purpose.

139. Even the content of discussions between Nexteer and Mando was to be treated as confidential.

The content of discussions between the Partners, and the fact that discussions between the Partners take place, shall also be governed by this Non Disclosure Agreement.

140. The parties also agreed that only employees with a need to know received any of the confidential information and as such if an employee left employment, the employing partner was obligated to ensure that the departed employee continued to abide by the terms of the NDA.

5. Under this Non Disclosure Agreement, the receiving Partner undertakes that INFORMATION received or obtained from the other Partner shall only be made available to employees or sub-suppliers insofar as their involvement is necessary for technical reasons and who are obligated to secrecy, and that due diligence shall be exercised to prevent unauthorized employees from gaining access to the INFORMATION received. Using all measures permitted under labor law, the respective receiving Partner shall ensure that the secrecy obligation continues to apply to employees who leave the respective receiving Partner's services during the term of this Non Disclosure Agreement. The respective receiving Partner is responsible for the compliance to the Non Disclosure Agreement by employees and the sub-suppliers included by him.

141. The terms of the NDA extended for at least five years after June 1, 2012 and the confidentiality obligations contained in the NDA extended indefinitely.

7. This Non Disclosure Agreement shall enter into effect retroactively as of 1 of June 2012 covering all INFORMATION exchanged since that date and shall terminate 5 (five) years after finishing the last project in relation to the Purpose set forth above.

Nevertheless, the confidentiality obligations contained in this Non Disclosure Agreement regarding INFORMATION received or obtained by receiving partner during the co-operation will remain in force without limitation in time. This obligation shall especially remain in force for Know-How, manufacturing, business and trade secrets, which receiving Partner becomes aware of during the course of activities concerning the project.

142. Clearly, both Mando and Nexteer understood and acknowledged that the trade secrets and confidential information that each possessed would be treated with the utmost confidentiality and would not be utilized by the other in any manner other than that specified in the NDA.

143. As Nexteer worked through this consideration period, it became apparent that Mando's products had various technical and performance problems. Mando was not able to correct those problems. The consideration of joint work with Mando ended effective August 2013.

Mando Has Experienced Little Success In Its Attempts To Compete Against Nexteer

144. Nexteer Automotive has a history of successfully competing against Mando Corporation for electric power steering business. In 2013, Nexteer received two new lines of EPS business upon which Mando unsuccessfully bid. Chrysler awarded its "LWR" electric power steering business to Nexteer Automotive, when that business had previously been given to Mando Corporation. General Motors awarded its C-1XX project to Nexteer Automotive.

145. Upon information and belief, Nexteer received these two lines of business because its EPS product was superior and more reliable than Mando's product. Employing a hydraulic power steering system, Mando had done significant business with General Motors in the past. The loss of the C-1XX contract was a substantial blow to Mando.

146. In addition, upon information and belief, General Motors has expressed its disappointment with the quality of Mando's product and, in the Spring of 2013, Mando was removed from the GM Supply Panel for poor quality.

147. Upon information and belief, Mando's principal client, Hyundai, has also expressed dissatisfaction with the performance of Mando's products, and Mando has lost market share with Hyundai.

148. Losing bids for new work, losing market share, experiencing technical problems, lacking managerial know how, and having failed on the project seeking to incorporate Nexteer's advanced Modular Power Pack into its steering system, Mando resorted to more desperate measures.

**Unable To Legally Gain Access To Nexteer's Product And Losing Market Share,
Mando Resorts To Wrongful Actions In An Effort To Compete**

149. Upon information and belief, Mando is in the process of opening a Research and Development facility in Bay City, Michigan. For various reasons, it clearly appears that Mando and the Individual Defendants are collaborating to staff the facility with former Nexteer employees; to wrongfully utilize the proprietary/confidential and trade secret information of Nexteer and other Nexteer property possessed by the Individual Defendants; to decimate Nexteer's MPP Section and convert it to Mando's use, and to persuade other Nexteer employees to leave their Nexteer employment and work with the Individual Defendants at Mando. All of

these actions are in furtherance of Mando's efforts to supplant Nexteer as the leading manufacturer of EPS Systems in North America.

150. Upon information and belief, when Mando lost the EPS contract with General Motors, the C1XX Project, it began to heavily recruit Nexteer employees including Kevin and Christian Ross and encouraged them to recruit other Nexteer employees, contrary to their contractual obligations.

151. Upon information and belief, Mando drastically increased the wage of the Nexteer engineers it hired in furtherance of its wrongful actions of having Nexteer employees provide it with confidential/proprietary and trade secret information and other Nexteer property, even though the provision of such property violates the Individual Defendants' Nexteer Employment Agreements.

152. During the April to August, 2013 timeframe, while the NDA was in effect and Nexteer and Mando were considering working with each other, Mando was actively and surreptitiously soliciting Nexteer employees to work for it. Although the purpose of the potential collaboration was clearly delineated, Mando, in violation of the terms and spirit of the NDA, utilized the potential collaboration to secure information on the key Nexteer employees, operations, products, and technology so that it could obtain the same for its own use.

153. Nexteer has never before experienced a situation where so many key engineering employees abruptly resigned without notice while at the same time a Nexteer competitor is gearing up to staff a new facility with engineers who possess the qualifications held by the recently-departed employees.

154. All of the Nexteer engineers have access to a tremendous amount of trade secret and confidential business information, including:

- a. Source code – this is EPS software that contains complete details of the ins and outs of the Nexteer products;
- b. Drawings and specifications;
- c. Supplier pricing;
- d. Contracts;
- e. Nexteer pricing; and
- f. Terms and conditions of Nexteer's work.

155. Allowing Mando access to these six items could immediately put Mando on competitive terms with Nexteer and could instantly destroy Nexteer's competitive advantage. Further, allowing Mando to decimate and convert Nexteer's MPP Section of Future Engineering would harm Nexteer's current and future business.

156. Nexteer has been apprised and therefore believes that Mando has an organization chart with 25 blank engineering positions and intends to fill up all of those slots with Nexteer engineers. As a result of the failed 2013 project, documented through the NDA Agreement, and other business dealings through the years, Mando knows the information these former Nexteer employees possess and is anxious to utilize this information to upgrade its product.

157. Upon learning that the Individual Defendants either intended to work for Mando or had actually started their Mando employment, Nexteer's counsel contacted each Individual Defendant by letter dated September 12, 2013 or September 13, 2013, notifying him of his obligations under the employment agreement and that any disclosure of confidential, proprietary or trade secret information or any effort to solicit Nexteer employees to work for Mando would constitute a breach of the agreement. Each letter demanded that the employee not engage in any conduct that would violate the terms of his employment agreement. Nexteer's counsel also

cautioned that Nexteer intended to pursue all legal and equitable remedies to secure the employee's compliance with the employment agreement. See Exhibit 5.

158. Mando is fully aware of each employee's obligations under the employment agreements. In a letter to Mando dated September 12, 2013, Nexteer's counsel apprised Mando of the Individual Defendants' continuing obligation under their employment agreements with Nexteer. Further, counsel pointed out that these obligations include but are not limited to, the requirement to keep Nexteer's confidential, proprietary and trade secret information free from disclosure and misappropriation, and the obligation not to encourage the former Nexteer employees to solicit or induce other Nexteer employees to leave their employment to work at Mando. See Exhibit 6.

159. Through Exhibit 6, counsel noted that these Individual Defendants, based upon reports that the company has received and the express language of these agreements, are breaching their employment agreements with Nexteer.

160. Furnishing Mando with each of the letters, Nexteer put Mando on notice of the existence of the agreements and of the fact that the Individual Defendants' actions on behalf of Mando constitute a clear breach of those agreements. Mando also was placed on notice that Nexteer considered Mando's actions to constitute tortious interference in regard to Nexteer's relationship with its employees.

161. The Individual Defendants and Mando have refused to take appropriate action to prevent the breaches of their obligations and/or to cease breaching their various obligations to Nexteer, and for the reasons stated below Nexteer believes that Mando fully intends to utilize the Individual Defendants to secure Nexteer's proprietary, confidential and trade secret information and other property so it can duplicate or replicate Nexteer's better performing steering systems or

at least improve the performance of their product. Further, for the reasons stated herein Nexteer believes Defendants are making a concerted effort to decimate Nexteer's MPP Section and convert it to Mando's use.

162. Upon information and belief, Mando and the Individual Defendants are continuing to solicit Nexteer employees.

163. By virtue of the above described unlawful acts, Mando and the Individual Defendants will irreparably harm Nexteer as it stands to lose confidential and proprietary information and trade secrets, more employees, its MPP Section, and customers.

164. If Mando and the Individual Defendants are not immediately barred from violating and causing the violation of the employment agreements and other legal obligations, Nexteer will suffer irreparable harm.

165. Nexteer lacks an adequate remedy at law to address the substantial and irreparable harm it will suffer if it does not obtain the requested relief.

Count I
(Breach of Contract Against Individual Defendants)

166. Nexteer realleges and incorporates by this reference the allegations set forth in the preceding paragraphs of this Complaint.

167. The employment agreements between Nexteer and each of the Individual Defendants are valid and enforceable contracts under Michigan law.

168. The terms of the employment agreements were confirmed by Nexteer in part by letters sent to each of the Individual Defendants on or about September, 2010, which letters provide in pertinent part:

You acknowledge that you are privy to trade secrets and other confidential information/proprietary information concerning Nexteer Automotive. You agree that you will not discuss or disclose to any person or entity any trade secrets,

confidential and/or proprietary information and, upon termination of your employment, you shall return such information to Nexteer Automotive.

169. By virtue of the above described actions, the Individual Defendants have breached and will continue to breach their contractual obligations to Nexteer contained in their employment agreements and supplemented by the September 2010 letters sent by Nexteer to its employees, including the Individual Defendants.

170. In the alternative, to the extent the 2010 letters are deemed to supersede rather than confirm or supplement the employment agreements, those 2010 letters establish separate contractual obligations which the Individual Defendants have breached for the reasons stated herein.

171. Nexteer has performed all of its obligations under the employment agreements and the 2010 letters.

172. The Individual Defendants' ongoing breach of their contractual duties constitute transgressions of a continuing nature, for which Nexteer has no adequate remedy at law.

173. Nexteer has been and will continue to be injured by the Individual Defendants' breach of contract in an amount that cannot be fully ascertained or compensated by money damages.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which:

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Count II
(Tortious Interference with Business Relationships and Business Expectations –
Against All Defendants)

174. Nexteer realleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint.

175. Nexteer enjoys valid business relationships and expectations with employees and customers, for which the Individual Defendants and Mando are unfairly competing and will continue to unfairly compete.

176. These business relations and expectancies have a reasonable likelihood of future economic benefit for Nexteer.

177. The Individual Defendants, by virtue of their employment with Nexteer, and Mando, by virtue of its relationship with the Individual Defendants, the knowledge secured in regard to the NDA project, and its dealings in the industry over the years, know of Nexteer's relationships and expectations with these employees and clients.

178. Upon information and belief and as discussed herein, the Individual Defendants and Mando have intentionally and improperly interfered with and will intentionally and improperly interfere with Nexteer's employees, business relationships and expectations in numerous ways, including but not limited to inducing Nexteer employees and customers to turn to Mando instead of Nexteer.

179. Upon information and belief, the Individual Defendants and Mando have wrongfully induced or caused, and will continue to induce or cause Nexteer employees -- to abruptly resign their Nexteer employment to work for Mando and bring their various creations with them, to persuade other Nexteer employees to join them in working for Mando in violation of their contractual obligations, to collaborate with Mando in an effort to convert Nexteer's MPP Section of Future Engineering to Mando's use, and to otherwise breach their Nexteer

employment agreements or, in regard to Mando, to encourage such breach. These affirmative actions by the Individual Defendants and Mando as well as other actions discussed herein are in furtherance of their unlawful purpose to divert future business opportunities and expectations from Nexteer to Mando in their attempt to supplant Nexteer (with Mando) as the leading North American manufacturer of EPS systems.

180. By their wrongful conduct, the Individual Defendants and Mando have engaged in the intentional doing of a *per se* wrongful act or the doing of a lawful act with malice and unjustified in law, for the purpose of invading the business relationships or expectancies of Nexteer.

181. Nexteer has made Mando aware of the Individual Defendants' post-employment obligations, yet Mando has continued to foster, encourage and participate in the Individual Defendants tortious interference in derogation of Nexteer's contractual rights and business relationships and expectancies. Nexteer has apprised the Individual Defendants of their post-employment obligations, but they continue to ignore those obligations and to violate Nexteer's contractual rights and to tortuously interfere with Nexteer's business relationship and expectancies.

182. Nexteer has been or will be injured by the Individual Defendants' and Mando's acts of tortious interference.

183. The Individual Defendants' and Mando's ongoing acts of tortious interference constitute transgressions of a continuing nature, for which Nexteer has no adequate remedy at law.

184. Unless this Court enjoins the Individual Defendants and Mando from further acts of tortious interference, Nexteer will suffer irreparable injury and the immediate threat of irreparable injury.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which:

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Count III

(Tortious Interference with Contract – Against Defendant Mando)

185. Nexteer realleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint.

186. Mando is a direct competitor to Nexteer.

187. Nexteer had agreements with each of the Individual Defendants which provided that all writings, designs, developments, works, and/or inventions (collectively "creations") that were made or conceived during their terms of employment were the property of Nexteer, and also prevented them, for a period of one year after leaving Nexteer's employ, from soliciting Nexteer employees to work with them.

188. On or about September 12, 2013, Nexteer notified Mando of the existence of these contractual limitations under which the Individual Defendants were contractually obligated not to solicit Nexteer employees on behalf of Mando and were contractually obligated not to provide Mando with any creations belonging to Nexteer.

189. Mando nonetheless employs and will continue to employ the Individual Defendants in positions that will require them to provide Mando with creations belonging to

Nexteer and that will encourage them to solicit Nexteer employees -- thereby causing the Individual Defendants to be in continuing breach of their agreements with Nexteer.

190. Upon information and belief, Mando has intentionally and knowingly, and without reasonable justification or excuse, caused or induced the Individual Defendants to breach the terms of their agreements with Nexteer. Specifically, as discussed herein, Mando is taking and has taken affirmative actions to decimate, duplicate, and convert Nexteer's MPP Section of its Future Engineering Group. These actions are in furtherance of Mando's unlawful purpose of causing the Individual Defendants to breach their contractual obligations owed to Nexteer and support Mando's attempt to convert Nexteer's MPP Section and supplant Nexteer as the leading manufacturer of EPS systems in North America.

191. By its wrongful conduct, Mando has engaged in the intentional doing of a *per se* wrongful act or the doing of a lawful act with malice and unjustified in law, for the purpose of invading the contractual rights of Nexteer.

192. As a proximate result of Mando's wrongful conduct, Nexteer will suffer irreparable harm and damage if it does not obtain its requested relief.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which:

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Count IV

(Breach of Fiduciary Duty – Against Individual Defendants C. Ross, K. Ross, Dodak, Sebastian, and Seeger)

193. Nexteer realleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint.

194. Defendants C. Ross, K. Ross, Dodak, Sebastian, and Seeger are high level employees of Nexteer who were trusted and relied upon to play integral parts in running the Future Engineering Group and other key Nexteer operations and who were given access to proprietary Nexteer business information and had conceived or made various creations during their Nexteer employment. Accordingly, they owed Nexteer fiduciary duties including, but not limited to, the duty to act with the utmost good faith, prudence, and loyalty, and the duty of trust and confidence. Further, these five Defendants owed Nexteer a duty to disclose the efforts of Mando to cause them to breach their employment agreements with Nexteer, to disclose the efforts of Mando to solicit Nexteer employees while supposedly collaborating with Nexteer, and to disclose the efforts of Mando to convert the MPP Section of Nexteer's Future Engineering Group. Overall they owed Nexteer a duty not to act for the benefit of Mando, to the detriment of Nexteer.

195. For the various reasons stated herein, including the soliciting of other Nexteer employees to work with them at Mando and cooperating with Mando in its attempt to convert Nexteer's MPP operation, these five Individual Defendants have breached their fiduciary duties owed to Nexteer.

196. As proximate result of C. Ross', K. Ross', Dodak's, Sebastians' and Seeger's breach of their fiduciary duties, Nexteer will suffer irreparable harm and damages if it does not obtain its requested relief.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which;

- A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;
 - B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;
 - C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;
 - D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;
 - E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and
 - F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.
2. Nexteer also requests that this Court enter an order granting it:
- A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;
 - B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.
 - C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;
 - D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;
 - E. An award of reasonable attorney fees; and
 - F. Such other and further relief as the Court may deem necessary, just and proper.

Count V
(Aiding and Abetting/Knowing Participation in Breach of Fiduciary Duties Against Defendant Mando)

197. Nexteer realleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint.

198. Defendant Mando as a result of its NDA "collaboration" with Nexteer and its prior business dealings with Nexteer was well aware that individual Defendants C. Ross, K. Ross, Dodak, Sebastian and Seeger were high ranking Nexteer engineers and owed to Nexteer the fiduciary duties of good faith, prudence, and loyalty.

199. Despite possessing this information, Mando encouraged these five individuals to conceal the fact that Mando was offering them large pay increases to leave Nexteer and join Mando, at the same time that Mando was supposedly collaborating with Nexteer; to conceal the fact that Mando was planning to decimate Nexteer's MPP Section and convert it to Mando's use by hiring Nexteer's MPP employees and utilizing the five Defendants in furtherance of this effort (but in violation of these five Defendants' employment agreements); upon information and belief, to conceal the fact that Mando was not collaborating with Nexteer in good faith but was instead securing information to use against Nexteer; and to conceal the fact that Mando was planning to secure and utilize Nexteer information protected by contract or statute.

200. Through these and other actions discussed herein, Mando took affirmative steps to aid, abet, and facilitate the Individual Defendants' breach of fiduciary duty.

201. Upon information and belief, Mando is continuing to take these actions, encouraging not only the Individual Defendants but also other Nexteer employees to breach fiduciary and contractual duties owed to Nexteer in furtherance of Mando's goal to convert Nexteer's MPP Section and supplant Nexteer as the leading manufacturer of EPS systems in North America.

202. As a result of this wrongful conduct by Mando, Nexteer will suffer irreparable harm and damages if it does not obtain its requested relief.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which:

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Count VI

(Violation of the Michigan Uniform Trade Secrets Act – Against All Defendants)

203. Nexteer realleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint.

204. In their capacity as employees, the Individual Defendants were provided access to Nexteer's confidential and proprietary information, and trade secrets, including, but not limited to engineering plans, designs, drawings and specifications, client lists, referral sources, contract information and other confidential information.

205. Key portions of this information is not readily ascertainable by others and is valuable to Nexteer and would be valuable to others due to the fact that it is not readily ascertainable. Further, as discussed above, Nexteer works to maintain the confidentiality of this information.

206. Upon information and belief, and as discussed above, the Individual Defendants and Mando have wrongfully misappropriated, used and disclosed confidential and proprietary information and trade secrets to Nexteer's competitive disadvantage in violation of MCL 445.1901, et seq. and/or are in the process of so doing.

207. The Individual Defendants and Mando will continue to use and disclose Nexteer's confidential and proprietary information and trade secrets and may have already disclosed or used this information in ways unknown to Nexteer.

208. As a proximate result of the Individual Defendants' and Mando's wrongful conduct, Nexteer will suffer irreparable harm and damages if it does not obtain its requested relief.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which:

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Count VII

(Unjust Enrichment and Quantum Meruit Against All Defendants)

209. Nexteer realleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint.

210. Through the conduct described above, all Defendants have received, are receiving or will receive undeserved benefits resulting from their improper and wrongful actions. It would be unjust and unfair to allow them to retain such benefits.

211. Through their years of work at Nexteer, the Individual Defendants have learned various information about Nexteer's products, including its EPS System and Modular Power Pack. In addition, the Individual Defendants have created writings, designs, developments, works, inventions, and innovations during their employment with Nexteer: All of which -- whether or not constituting confidential, proprietary, or trade secret information -- is Nexteer's property.

212. Under their agreement with Nexteer, these Individual Defendants are well aware that this information is and remains the property of Nexteer and cannot be disclosed or used for the benefit of any person or entity other than Nexteer. Nevertheless, the Individual Defendants have received large wage increases to work for Nexteer's competitor, Defendant Mando, with the clear expectation that they will utilize the information and property they gained or created during their Nexteer employment for Mando's benefit. Thus, they are being unjustly enriched for their improper actions.

213. Mando has failed in its attempts to upgrade its electronic power steering system to be competitive with Nexteer and has resorted to raiding Nexteer's employees to secure the information and expertise it needs for an upgrade.

214. Nexteer and its predecessor companies over a period of many decades have researched, developed, tested, and improved their advanced steering system products, incurring great expense to secure Nexteer's position as the leading electric power steering system supplier in the North American marketplace.

215. By hiring Nexteer's key engineering employees at huge wage increases and getting them to turn over the information and property that belongs to Nexteer, Mando improperly seeks to obtain the fruits of Nexteer's decades of effort and expense.

216. Similarly, Nexter, through years of work and investment, developed and refined the Modular Power Pack Section of its Future Engineering Group into perhaps the leading such section in the industry. Through the actions discussed herein, Mando has converted this Section to its own use, much to the benefit of Mando and the detriment of Nexteer.

217. Thus, by their improper and wrongful conduct, all Defendants are being and will continue to be unjustly enriched.

218. Defendants also are liable to Nexteer under the equitable remedy of Quantum Meruit.

219. Defendants are all benefiting or will benefit from the proprietary/confidential and trade secret information and other property that belongs to Nexteer, but is being brought to Mando by the Individual Defendants, by the improper soliciting of Nexteer employees, and by the conversion of Nexteer's MPP Section of its Future Engineering Group to Mando.

220. To the extent that Defendants are allowed to utilize this information and property, these employees, and this Section for their own benefit, they are obligated under equity to pay to Nexteer the value of same. They have not done so.

221. As a direct and proximate result of the Defendants' actions, Nexteer will suffer irreparable harm and damages if it does not obtain its requested relief.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which;

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Count VIII

(Common Law and Statutory Conversion - All Defendants)

222. Nexteer realleges and incorporates by reference the allegations set forth in the preceding paragraphs of this Complaint.

223. As explained herein, Defendants have converted Nexteer's MPP Section of its Future Engineering Group to Mando's use in their continuing effort to supplant Nexteer as the leading manufacturer of EPS systems in North America.

224. The Individual Defendants secured, learned, or created various information, writing, designs, developments, works, and inventions during their Nexteer employment.

Whether or not this matter constitutes proprietary, confidential, or trade secret information it is and remains the personal property of Nexteer.

225. The Defendants are asserting and will continue to assert dominion over this property, wholly inconsistent with Nexteer's contractual rights under the Individual Defendants' employment agreements, the Non-Disclosure Agreement with Mando, common law, and statutory law.

226. Defendants have an obligation not to utilize and to return to Nexteer any information constituting writings, designs, development, works, inventions or other creations that the Individual Defendants conceived, learned about or were exposed to as the result of their Nexteer employment. In addition, Defendants' conversion of Nexteer's MPP Section is unlawful and Defendants are liable therefor.

227. Upon information and belief, it is the Defendants' intent to utilize this property and this Section in developing, designing, upgrading and/or manufacturing Mando's products. This use is wrongful and improper.

228. Mando and the Individual Defendants have received and possess this property and this Section and are working together to conceal or aid in the concealment of the property and Section knowing that it belongs to Nexteer and is being converted to Mando's use. The fact that portions of the property may reside in the memory of the Individual Defendants rather than on a piece of paper or in a computer does not make its utilization any less wrongful; nor does the fact that Defendants converted an entire Nexteer operation shield them from liability.

229. Nexteer has demanded that Defendants return its property, stop their efforts to utilize the Individual Defendants in the conversion of Nexteer's MPP Section, and not utilize the information and knowledge that the Individual Defendants have gained during their many years

of Nexteer employment and that Mando has gained through the NDA project and from the Individual Defendants. Defendants have failed to satisfy Nexteer's demands.

230. As a result of their actions Defendants have committed common law and statutory conversion, and Nexteer has suffered actual damages, exclusive of materials, costs, interest and attorney fees.

231. Absent injunctive relief, Defendants' misconduct will result in irreparable harm to Nexteer for which there is no adequate legal remedy.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which:

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is

entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and property wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Count IX
(Civil Conspiracy - All Defendants)

232. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs of this Complaint.

233. All Defendants acted in concert and their conduct, jointly and severally, constitutes a civil conspiracy against Nexteer to obtain information, property, and employees from Nexteer to utilize in an improper scheme to copy, duplicate, and convert Nexteer's superior product and operations and/or to use information and property wrongfully obtained from Nexteer to upgrade Mando's product so that it can supplant Nexteer in the marketplace.

234. In groups of two or more, the Defendants also acted in concert with the intent to achieve one or more of the following unlawful purposes:

- a. To breach the Individual Defendants' contractual duties owed to Nexteer;
- b. To breach fiduciary duties owed to Nexteer;
- c. To aid and abet in the breaches of the contractual and fiduciary duties;

- d. To encourage other Nexteer employees to leave the company to join one or more of the Individual Defendants in employment at Mando;
- e. To surreptitiously solicit Nexteer employees and to secure Nexteer information and property during the NDA consideration process contrary to the purpose, spirit, and language of the NDA agreement;
- f. To convert the information, operations, and property of Nexteer to Mando's use and dominion;
- g. To conceal Defendants' improper activity and act in a manner that would have the maximum negative effect on Nexteer; and
- h. To wrongfully seek to obtain, without payment, the fruits of Nexteer's decades of effort in developing the leading steering system in the North American marketplace.

235. By engaging in the illegal or unlawful actions described in this Complaint, Defendants manifested their agreement to join a conspiracy and/or conspiracies, and have knowingly participated in the conspiracy and/or conspiracies.

236. No Defendant alone could have accomplished the objects of the conspiracy. Each was aided and abetted by at least one or more other Defendants or their agents, servants, or employees in achieving one or more of the aforementioned unlawful purposes.

237. As a direct and proximate result of these Defendants' conspiracy and actions in furtherance of their conspiracy, Nexteer will suffer irreparable harm and damages if it does not obtain its requested relief.

WHEREFORE, Nexteer respectfully requests that this Honorable Court grant the following relief:

1. The entry of a temporary restraining order and/or a preliminary injunction against all Defendants which:

A. For a period of one year from the date of the requested order enjoins and restrains the Individual Defendants from soliciting or enticing away employees of Nexteer on behalf of Mando;

B. Permanently restrains all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's EPS and MPP systems;

C. Permanently restrains all Defendants from any attempts to copy, duplicate or replicate Nexteer's EPS System, including its Modular Power Pack;

D. Requires all Defendants and those acting in concert with them to immediately return to Nexteer all confidential and proprietary information and trade secrets in their possession, custody and control and any and all other Nexteer property in their possession, custody or control;

E. Enjoin and restrains Mando from using or otherwise relying on the Individual Defendants for soliciting Nexteer employees or customers and from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets and requiring Mando to return to Nexteer any such information it has secured; and

F. Prohibits the 10 Individual Defendants from working on, consulting in regard to, or in any way participating in the development of Mando's EPS system for a period of one year from the date the requested order is entered and prohibits Mando from employing them for this purpose during the one year period.

2. Nexteer also requests that this Court enter an order granting it:

A. An award and accounting of actual and compensatory damages against Mando and the Individual Defendants in an amount which is not yet determined, but is in excess of \$25,000;

B. An award of money damages against Nexteer and the Individual Defendants based on their unjust enrichment.

C. An award of money damages to Nexteer for Quantum Meruit based on the value of the information and operations wrongfully taken from it;

D. An award of treble money damages and attorney fees as a result of the Defendants converting Nexteer's property;

E. An award of reasonable attorney fees; and

F. Such other and further relief as the Court may deem necessary, just and proper.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
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Dated: December 6, 2013

JURY DEMAND

Plaintiff demands a jury on all issues so triable.

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Dated: December 6, 2013

PROOF OF SERVICE

Lolly Zavaleta, being first duly sworn, deposes and says that she served a copy of the First Amended Complaint and Jury Demand upon counsel of record on December 6, 2013 by placing said document in a properly addressed envelope, addressed via

☒ First Class Mail ☐ Facsimile
☒ Email ☐ Hand Delivery Via Messenger



Lolly Zavaleta

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EXHIBIT K

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

NEXTEER AUTOMOTIVE
CORPORATION, a Delaware corporation,

Plaintiff,

v.

MANDO AMERICA CORPORATION, a
Michigan corporation, et al., jointly and
severally,

Defendants,

And

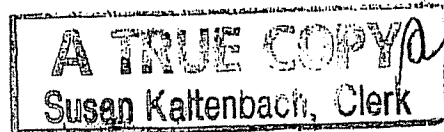
CHRISTIAN ROSS, an Individual; KEVIN
ROSS, an Individual; TOMY SEBASTIAN, an
Individual; THEODORE G. SEEGER, an
individual; and TONY DODAK, an Individual,
Counter/Third-Party Plaintiffs

v.

NEXTEER AUTOMOTIVE
CORPORATION, a Delaware corporation, et
al.,
Counter/Third-Party Defendants

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Case No. 13-021401-CK-1
JUDGE M. RANDALL JURRENS

SUPPLEMENTAL BRIEF OF
PLAINTIFF NEXTEER AUTOMOTIVE
AS TO MANDO AMERICA'S WAIVER
OF ARBITRATION

FILED
SAGINAW COUNTY, MICH
JUN 24 PM 4 04
CLERK OF COURT
BY DEBORAH J. JONES

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SUPPLEMENTAL BRIEF OF PLAINTIFF NEXTEER AUTOMOTIVE
AS TO MANDO AMERICA'S WAIVER OF ARBITRATION

INTRODUCTION

The Non-Disclosure Agreement was never a secret in this case. The original complaint mentioned it as background information. Quite rightly, Mando did not view that narrow arbitration clause as covering the claims here, and, in fact, the clause does not apply. Instead, it is a narrow arbitration clause rooted in the terms of that Agreement, and it does not control this broad litigation. That might explain why Mando – a sophisticated litigant – and its esteemed counsel neither asserted the clause as an affirmative defense nor raised it during case management discussions.

During a hearing on June 3, 2014, the Court requested additional briefing, seeking cause as to why Mando Automotive did not waive any arguable right it ever had to arbitrate this matter when Mando and its counsel knowingly and voluntarily reviewed and consented to the Court's Case Management Order dated December 4, 2013, in which they agreed: "An agreement to arbitrate this controversy . . . exists [and] is not applicable." For the reasons that follow, Mando squarely gave up any arbitration argument.

ARGUMENT

Mando America clearly, knowingly and voluntarily waived any argument that Nexteer's claims are arbitrable under the parties' narrow Non-Disclosure Agreement.

By December 4, 2013, Mando's counsel had successfully defended against the entry of a TRO preventing their clients from using trade secrets, had met with the Court to discuss the case in detail, and had reviewed and approved a Case Management Order in which they recognized that although the arbitration clause in the Non-Disclosure Agreement exists, it does not apply to Nexteer's claims. For the limited purposes relevant to this supplemental brief, Nexteer's

currently pending claims do not differ materially from its original claims. Indeed, Nexteer partly relied on Mando's waiver when it declined to invest attorney time and fees in clarifying or distinguishing the purpose of mentioning the NDA here, and when Nexteer continued to note the NDA in briefs – resting on the assumption that everyone understood the limited background purpose and the knowledge that this matter was not subject to arbitration.

Wide-ranging research did not uncover any cases directly on point, especially none where sophisticated parties made such an express waiver directly to the Court. In general, however, Michigan courts regularly enforce consensual waivers. They enforce waivers of important constitutional and statutory rights, despite claims of a lack of knowledge or information. See also *People v Stevens*, 461 Mich 655, 664; 610 NW2d 881, 885 (2000) (“criminal defendants may knowingly and voluntarily waive the most fundamental protections afforded by the constitution”); *Crowe v City of Detroit*, 465 Mich 1, 8; 631 NW2d 293, 297 (2001) (police officers waived statutory workers compensation rights by electing municipal benefits). They enforce contractual waivers by unrepresented laypersons who are “semiliterate.” See *Horn v Cooke*, 118 Mich App 740, 747; 325 NW2d 558, 561 (1982) (semiliterate plaintiff could not avoid agreement to arbitrate medical claims, which she signed while influenced by her fears of surgery). They enforce waivers by minors “in the low average IQ range.” See *In the Matter of Kowalski*, unpublished opinion per curiam of the Court of Appeals, issued Jan 10, 2013 (Docket No. 311187) (minor could not withdraw waiver of counsel or plea to school disciplinary violation) (Exh 1). In short, they enforce waivers by much less knowledgeable and informed persons than the sophisticated defendants and defense counsel here.

In civil cases involving arbitration agreements, Michigan courts do not require the waiver to be knowing, as long as it is voluntary. *Feinberg v Straith Clinic*, 151 Mich App 204, 216; 390

NW2d 697, 702 (1986) (“[W]e believe that a standard for waiver requiring voluntariness sufficiently accommodates the various interests involved”; allowing application of doctrine of constructive notice). Waivers can be implicit based on the parties’ conduct in court. E.g., *Boillat v Kelly Auto Grp, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 7, 2009 (Docket No. 286024) (by seeking and consenting to removal from small claims court, parties implicitly stipulated to the matter) (Exh 2).

Here, Mando America is an international company experienced in arbitration. The Court’s Order explicitly states that an arbitration agreement exists but it does not apply. Mando’s learned counsel had an opportunity to review and consent to the Court’s order, even though the original complaint specifically mentioned the Non-Disclosure Agreement. If those circumstances do not demonstrate that Defendants and their counsel knowingly and expressly gave up the arbitration argument, nothing can be waived.

Mando apparently wants to change course now, since it believes a different path is more expedient. Mando first raised the arbitration issue after Nexteer rejected Mando’s suggestion that it would restrict discovery to the American companies, not the Korean ones. But that sort of shape-shifting is disfavored. When a sophisticated party in commercial litigation waives the right, that should be final. See *Scheetz v IMT Ins Co (Mut)*, 324 NW2d 302, 304 (Iowa 1982) (“[T]here is no support in our case law for an insurer to repudiate a valid waiver of a contractual provision.”).

Here, Nexteer relied on Mando’s waiver. It formulated, funded and pursued its strategy – including the investigation of fact-intensive claims involving theft, misdirection and disloyalty – in reliance upon Mando’s approach. Had Mando signaled its intentions from the start, this case would already be different. Nexteer would not have spent tens of thousands of dollars or more to

prepare briefs and motions to be filed in this Court. International arbitration often limits discovery, generally relies heavily on documentary submissions rather than live testimony, and is usually not equipped or inclined to evaluate fact-intensive tort claims. If the matter had been postured for arbitration, Nexteer would have focused on clarifying and limiting the matters to be decided in arbitration, and it would have foregone investment in exposing additional facts. Since Mando's clear and voluntary waiver, Mando has continued to seek and pursue discovery, even as the Court continued to hear numerous motions and to assist the parties in refining the issues and the path forward. There is too much water under the bridge to change course now. The waiver is unavoidable, and Mando's motion should be denied.

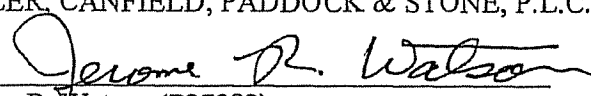
CONCLUSION

It is hard to find a more capable set of litigants and attorneys than the opponents here. They were presented directly with the question whether the NDA's narrow arbitration clause applied to this case, and they correctly acknowledged that it does not. Since then, the parties proceeded forward in reliance upon Mando's acknowledgement. That should be the end of the matter. Michigan courts enforce waivers by much less knowledgeable litigants. Mando cannot flip-flop now. Nexteer respectfully submits that Mando waived the arbitration issue, and its Motion to Amend should be denied.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK & STONE, P.L.C.

By:


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Dated: June 24, 2014

PROOF OF SERVICE

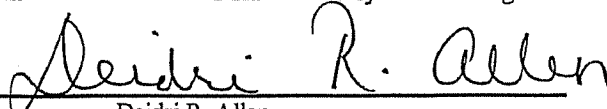
The undersigned, being first duly sworn, deposes and says that she served a copy of Supplemental Brief of Plaintiff Nexteer Automotive as to Mando America's Waiver of Arbitration upon counsel of record on June 24, 2014 via

☒ First Class Mail

☐ Facsimile

☐ Email

☐ Hand Delivery Via Messenger



Deidri R. Allen

22406073

EXHIBIT “1”

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 10, 2013

In the Matter of E. KOWALSKI, Minor.

No. 311187
Oakland Circuit Court
Family Division
LC No. 2011-791150-DL

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right an order placing him at the Oakland County Children's Village, following his adjudication by plea of admission to one count of school incorrigibility, MCL 712A.2(a)(4). Respondent argues that the trial court erred by denying his motion to withdraw his plea on the ground that he was not represented by counsel when offering his plea and that neither the waiver of counsel nor the plea was made understandingly. We affirm because respondent and his father were sufficiently informed of respondent's rights and appeared to understand them before respondent refused counsel and made his plea.

On November 15, 2011, petitioner filed a petition alleging that respondent was in violation of MCL 712A.2(a)(4), because of his incorrigibility in school. At the January 3, 2012, pretrial hearing, respondent waived his right to counsel and respondent's father also agreed to waive respondent's right to counsel. After waiving his rights to counsel, respondent entered a plea of admission to the charge of school incorrigibility. Before accepting respondent's plea, the referee asked respondent about the accuracy of most of the allegations provided in the petition. Respondent admitted that most of those allegations were true. Upon finding a sufficient factual basis for the charge, the referee accepted respondent's plea of admission to school incorrigibility.

On February 2, 2012, an emergency hearing was held because respondent had been truant from his home on three different occasions since the last hearing. At that time, the referee appointed counsel for respondent, who was subsequently charged with assaulting his father. Regarding the school incorrigibility charge, respondent's counsel moved to withdraw respondent's admission of school incorrigibility "in part because he did not have counsel for that particular petition at that particular time and [respondent's counsel did not] believe that he necessarily knew exactly what he was doing in offering his plea." In addressing the request to withdraw respondent's plea, the referee first stated that he had reviewed the psychological evaluation that was performed on respondent. The referee then noted that, while the evaluator found respondent to be in the low average IQ range, the evaluator believed the evaluation was "a

very low representation of [respondent's] abilities as [respondent] put forth at the time of the evaluation very little or minimal effort in the testing process." The referee then denied the motion to withdraw the plea.

"There is no absolute right to withdraw a . . . plea once it is accepted." *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989). "Before the court accepts the plea, the juvenile may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the juvenile to withdraw a plea." MCR 3.941(D). Thus, a trial court's decision on a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997); *Zelzack*, 180 Mich App at 126. "When a [juvenile] moves to withdraw his . . . plea before sentencing, the burden is on the [juvenile] to establish a fair and just reason for withdrawal of the plea." *Harris*, 224 Mich App at 131.

"A juvenile may offer a plea of admission or of no contest to an offense with the consent of the court." MCR 3.941(A). The trial court, however, "shall not accept a plea to an offense unless the court is satisfied that the plea is accurate, voluntary, and understanding," as set forth in MCR 3.941(C), which provides in relevant part:

(C) Plea Procedure. Before accepting a plea of admission or of no contest, the court must personally address the juvenile and must comply with subrules (1)-(4).

(1) *An Understanding Plea.* The court shall tell the juvenile:

- (a) the name of the offense charged,
- (b) the possible dispositions,
- (c) that if the plea is accepted, the juvenile will not have a trial of any kind, so the juvenile gives up the rights that would be present at trial, including the right:
 - (i) to trial by jury,
 - (ii) to trial by the judge if the juvenile does not want trial by jury,
 - (iii) to be presumed innocent until proven guilty,
 - (iv) to have the petitioner or prosecutor prove guilt beyond a reasonable doubt,
 - (v) to have witnesses against the juvenile appear at the trial,
 - (vi) to question the witnesses against the juvenile,
 - (vii) to have the court order any witnesses for the juvenile's defense to appear at the trial,
 - (viii) to remain silent and not have that silence used against the juvenile, and
 - (ix) to testify at trial, if the juvenile wants to testify. [MCR 3.941(C)(1).]

Here, the trial court ensured that the plea was made understandingly by complying with MCR 3.941(C)(1). The trial court informed respondent of the charge against him, the possible dispositions, and the rights to a trial that respondent would forfeit once a plea of admission was accepted. While respondent argues that there were “indicators,” that respondent did not “understand his rights in the proceedings or the effect of the plea,” i.e., that respondent was previously designated as emotionally impaired and he had been receiving services during the time that he offered his plea of admission, the record shows otherwise. The trial court discussed several of the specific allegations with respondent and provided respondent the opportunity to explain, accept, or deny the factual allegations as stated in the petition. During this discussion, respondent was able to discuss the allegations without difficulty and agreed to their accuracy. Respondent also expressed no hesitation or confusion regarding his decision to offer his admission to the charge of school incorrigibility. Before accepting the plea, the trial court asked respondent if he was offering his plea of admission to school incorrigibility and explained that “incorrigible means behaving very badly.” Respondent quickly replied, “Yeah, I have been behaving very badly in school.” Considering the above, the plea was properly accepted. MCR 3.941(C).

Further, because respondent’s waiver of counsel was understandingly made and respondent’s father, who was present, did not object to respondent’s waiver, the trial court did not err in accepting respondent’s plea without the presence of counsel. “Although juvenile proceedings are not considered adversarial in nature, they are closely analogous to the adversary criminal process. Proceedings in a juvenile court need not conform with all the requirements of a criminal trial; however, essential requirements of due process and fair treatment must be met,” including the right to counsel. *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000)(internal citations omitted). “If the juvenile is not represented by an attorney, the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar, including trial, *plea of admission*, and disposition.” MCR 3.915 (emphasis added). Both MCL 712A.17c and MCR 3.915(A) govern the appointment and waiver of counsel in delinquency proceedings. Under MCL 712A.17c(3), a juvenile may waive his or her right to counsel but the waiver:

shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child’s parent or guardian ad litem objects or if the appointment is made under subsection (2)(e). [MCL 712A.17c(3).]

MCR 3.915(A)(3), similarly provides:

The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on subrule (A)(2)(e). The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made.

Respondent argues that the fact that he received services from Easter Seals or had previously been designated as emotionally impaired weighed against a finding that he

understandingly waived his right to counsel. “Low mental ability in and of itself [, however,] is insufficient to establish that a [juvenile] did not understand his rights.” *People v Cheatham*, 453 Mich 1, 35-36; 551 NW2d 355 (1996). As discussed above, there was no indication that respondent failed to appreciate or understand the proceedings or his rights to a trial or counsel. It is also important to note that respondent was later found to be competent to stand trial by two separate licensed psychologists. On the record, respondent indicated that he did not wish to be represented by counsel and then affirmed that he was waiving his right to counsel. Respondent’s father was also present and did not object to the waiver of counsel. MCL 712A.17c(3); MCR 3.915(A)(3). In discussing the right to counsel with respondent’s father, while respondent was present, the trial court explained that if counsel was requested she would be available to step in that moment. The trial court stated, counsel “is available, yes. She is here, she’s covering cases this morning. That’s her job.” At that point, neither respondent nor his father made such a request. Thus, both respondent and his father understandingly and voluntarily waived respondent’s right to counsel.

Accordingly, the trial court did not abuse its discretion in denying respondent’s motion to withdraw his plea.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro

EXHIBIT “2”

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA BOILLAT,

Plaintiff-Appellee,

v

KELLY AUTOMOTIVE GROUP, INC.,

Defendant-Appellant.

UNPUBLISHED
May 7, 2009

Nos. 277916; 284848; 286024
Ingham Circuit Court
LC Nos. 06-001430-AV,
07-001647-AV

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

This case arose out of a used vehicle purchase contract between plaintiff and defendant. Plaintiff purchased a vehicle from defendant in April 2005. Thereafter, the parties rescinded the contract, although they disagree on the terms of the rescission. Plaintiff then brought suit to recover the down payment on the vehicle. In Docket No. 277916, defendant appeals by leave granted from the circuit court's affirmance of the district court's order that defendant refund the down payment and also pay attorney fees under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* In Docket No. 284848, defendant appeals the circuit court's affirmance of the district court's order denying defendant's motion for relief from judgment and its affirmance of the district court's award of attorney fees as sanctions to plaintiff. In Docket No. 286024, defendant appeals the award of sanctions to plaintiff from the circuit court appeal. We affirm.

According to plaintiff, she visited a salesman at Kelly Automotive Group on April 26, 2005, after seeing an ad in the paper. She allegedly told the salesman over the phone that she had \$1,700 in deposit money, and explained that she could afford a car for \$200 a month and "needed something with PLPD¹" because it would be a lower cost insurance. In response, the salesman told her to bring the deposit and information about other cars that she had paid off in the past to the dealership. Plaintiff indicated that a courtesy van picked her up.

Plaintiff testified that after she arrived at Kelly Automotive, the salesman told her that he needed to take the \$1,700 deposit money to his manager, Gary Kelly, to show that she was

¹ Public Liability and Property Damage.

serious about buying a car. She testified that she did not see a car before the salesman took the money and did not get a receipt at the time the money was taken.² Plaintiff said that the salesman showed her three or four vehicles; she decided on a truck. Plaintiff testified that the salesman told her that since it was close to closing time, she should go get insurance for the truck while he discussed the pricing of the vehicle with Gary Kelly. Plaintiff indicated that she believed the truck would be within her means.

Although plaintiff had indicated to the salesman that she wanted something with PLPD, plaintiff testified that defendant told her she was required to have full coverage on the truck. The cost of the full coverage insurance was \$150 per month—almost the entire amount plaintiff had told the salesman she had available for her car payment. Plaintiff stated that after she returned from getting insurance, she told the salesman “it’s higher than I wanted to pay,” to which he replied that he would make the payments affordable even though she had gotten full coverage rather than PLPD. The salesman informed her that after applying her \$1,700 down payment, the balance due on the truck was \$4,852.60. She thought that paying that amount off over a period of 30 months was “doable” for her, because she calculated it to be about \$160 per month.

Plaintiff was then taken to a different building where the financing is done, and she met with Melanie Pulver. Plaintiff testified that when she received the installment contract from Pulver, everything had changed and the total price for the vehicle was \$10,213.70. Plaintiff was told that the added items on the installment contract were mandatory, including gap insurance and a service warranty, and that she could not leave the lot with the truck unless these items were part of the contract. Plaintiff noted that the interest rate on the truck was 25 percent. Plaintiff said that she started to have a panic attack and told Pulver that she could not afford the truck at that price. Plaintiff testified, “I told her no, I said no, I cannot do this, no, something’s wrong here.” Plaintiff said that Pulver “jumped up and ran out of the room” and that the salesman came back in. Plaintiff also told him that she could not afford the truck and that it was not what they had agreed on. Plaintiff said that the salesman told her not to focus on how expensive the car was, “focus on what I’ll be able to get you into, which is anything you want on this lot. [And?] look what it’ll do for your credit.” The monthly cost of the truck was \$283 plus the \$150 for the full coverage insurance, for a total of \$433—more than double what plaintiff initially indicated she could afford.

Plaintiff testified that she asked about taking the shuttle home and was told that all the shuttles had gone home for the day. The salesman said that he was late for dinner, and Pulver indicated that she was going the other way and could not drop plaintiff off either. Plaintiff testified that she told them she needed to get home and that she did not want the truck and that, if there had been a bus, or someone she could call, she “would have walked out with my kids and left.” Plaintiff indicated that she signed the contract because she did not have any other way home and she did not have any other choice.

² He apparently gave her a receipt about an hour and a half later.

Plaintiff testified that when she got home she was "really upset" and that she "got right on the phone and tried to work things out" with defendant's owner, Russ Kelly, about the truck purchase, but was only able to leave messages for him. After Russ Kelly did not return the calls, plaintiff "asked [if?] there was anybody else" and was told she could talk with Russ's son, Gary Kelly. Plaintiff testified that, because she also received no return calls from Gary Kelly, the first week of May she drove down to the business and met with Gary Kelly. Only Gary Kelly and plaintiff were present at this meeting. According to plaintiff, she told him that she did not want the truck and that she could not afford it. She testified that she offered to take the deposit and "move on to something that was affordable," or, if that not feasible, at a minimum that she wanted the extra charges removed, including the gap insurance and the service warranty protection plan, because another dealership had informed her that those were not mandatory items. Plaintiff said that Gary Kelly told her that she signed the contract and that he could not remove the extra items.

Plaintiff said that sometime in the next three weeks, she and Julie Johnsonbaugh, a helper from her church, met with Gary Kelly. Plaintiff explained to Gary Kelly that her child support payments had dropped and that she could not even afford to pay for utilities and telephone; she asked to be let out of the contract. According to plaintiff, Gary Kelly told her that he would rescind the contract; that he could make it as if it never was; that he would tear up the contract; and, if she wanted to purchase another car, that he would take the down payment and put it toward the other car. Plaintiff understood the conversation to mean that Gary Kelly would get the truck and plaintiff would get the down payment back. At the end of the meeting, plaintiff informed Gary Kelly that she had decided not to purchase another vehicle from Kelly Automotive Group.

Johnsonbaugh testified that Gary Kelly told her twice that he would rescind the contract with plaintiff and that, although he initially indicated he would have to get back with her on whether plaintiff would get her down payment back, he later indicated plaintiff would receive her down payment back, minus approximately \$400 for taxes paid on the truck. Soon after Gary Kelly said this, Johnsonbaugh said she told plaintiff that it was not right and then the two of them left. She also testified that the second time Gary Kelly stated he would rescind the contract, she did not understand the rescission to be conditional on plaintiff purchasing another vehicle from defendant.

Plaintiff said that her next contact with Gary Kelly was when she came back with Johnsonbaugh and returned the truck on June 11. Plaintiff testified that it was at this meeting that Gary Kelly informed her that he would not be giving her the deposit back and that he may be suing her. Plaintiff said that she was not sued, but that her credit report incorrectly showed a balance due of \$6,258. Plaintiff indicated that because of her credit report she has been unable to finance another car and she has had to rent a car on four occasions.

Plaintiff initially filed her complaint in small claims court. After the case was heard by a magistrate, plaintiff timely appealed the ruling pursuant to MCR 4.401(D). However, prior to the de novo hearing by the district court judge sitting in small claims, defendant hired counsel who appeared and requested removal to the district court. In light of the pending appeal of the magistrate's ruling, the district court agreed to defendant's request for removal. The district court relied, in part, on MCR 4.306(A)(2) which allows a party to remove from small claims to the district court by "appearing before the court at the time and place set for hearing and

demanding removal.” The district court concluded that because defendant’s counsel appeared and requested removal at the time and place set for the de novo hearing, the request fell within the rule.³ Plaintiff filed an amended complaint⁴ in the district court, alleging a violation of the MCPA, common law fraud, and ordinary negligence. After the bench trial in district court, the district court concluded that defendant’s failure to return plaintiff’s down payment was a violation of the MCPA and ruled in plaintiff’s favor.⁵ Defendant appealed to the circuit court, which affirmed. Defendant then requested leave to appeal to this Court, which was granted. *Boillat v Kelly Automotive Group, Inc.*, unpublished order of the Court of Appeals, entered October 16, 2007 (Docket No. 277916).

While defendant’s application for leave was pending, our Supreme Court decided *Liss v Lewiston-Richards, Inc.*, 478 Mich 203; 732 NW2d 514 (2007). Defendant filed a motion for relief from judgment in the district court, arguing that under *Liss*, the MCPA was inapplicable to plaintiff’s claim. The district court denied defendant’s motion, relying on the statement in *Liss* that the exemption to the MCPA is an affirmative defense and noting that defendant never raised the defense. See *Liss, supra* at 208 n 13. Apparently, a dispute arose over the proposed order and an additional hearing was required. The district court awarded plaintiff sanctions, concluding that defendant was unnecessarily drawing out the proceedings to disadvantage plaintiff. Defendant requested leave to appeal to the circuit court, which was denied. Defendant requested reconsideration, which was also denied. Plaintiff moved for attorney fees under both MCPA and as sanctions under MCR 2.114. The circuit court awarded plaintiff sanctions under MCR 2.114, concluding, as had the district court, that defendant was simply attempting to disadvantage plaintiff. Defendant requested leave to appeal both the circuit court’s affirmance of the district court’s order and the circuit court’s award of sanctions, which this Court granted, consolidating all three appeals. *Boillat v Kelly Automotive Group, Inc.*, unpublished order of the Court of Appeals, entered August 28, 2008 (Docket No. 284848); *Boillat v Kelly Automotive Group, Inc.*, unpublished order of the Court of Appeals, entered August 28, 2008 (Docket No. 286024).

³ Plaintiff’s counsel did not appear based on her understanding that attorneys were not permitted to appear in small claims court. However, in light of defendant’s filing an appearance on behalf of defendant and notifying plaintiff of his intent to appear, plaintiff counsel sent a letter to the district court requesting a modification or vacation of the small claims judgment, or consolidate the small claims case with plaintiff’s additional claims in the district court under the Michigan Consumers Protection Act, MCL 445.901 *et seq.* (MCPA).

⁴ There appears to be no original complaint other than the small claims complaint. We assume it is listed as amended because it alleges additional counts not brought in the small claims case.

⁵ The district court specifically did not make any factual findings or reach any conclusions as to plaintiff’s common law fraud or ordinary negligence claims. The trial court also focused only on plaintiff’s rescission argument and, therefore, a violation under MCL 445.903(1)(u). However, plaintiff had other claims under the MCPA that the trial court did not address, including MCL 445.903(1)(a), (m), (n), (o), (s), (w), (x), (y), (aa) and (bb).

Defendant first argues⁶ that its removal of the action from the small claims division to the district court should have been denied because removal was sought after the small claims magistrate issued a ruling. Defendant also argues that plaintiff's motion to modify or vacate the small claims order, or in the alternative to consolidate it with the district court case, should have been denied because to do so would go against the spirit of the waiver signed by both parties. We disagree. We review de novo the court's conclusions of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001), citing MRC 2.613(C) and *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Preliminarily, even if the removal was not effective, there was no jurisdictional issue with plaintiff raising a second cause of action directly in the district court regarding whether defendant violated the MCPA because the compulsory joinder provision of MCR 2.203(A) does not apply to cases brought in the small claims division of the district court. *Kaiser v Smith*, 188 Mich App 495, 499; 470 NW2d 88 (1991). However, under the circumstances of this case, we conclude that the district court also had jurisdiction over the claim for return of plaintiff's deposit. Plaintiff appealed the decision of the small claims division magistrate to the district court pursuant to MCR 4.401(D). On the date of the appeal hearing, defendant appeared through counsel, which is not permitted in small claims, MCR 4.301; MCL 600.8408(1), and removed the action, such that the de novo small claims hearing never occurred. Defendant now argues that removal was inappropriate. We find that defendant is precluded from making this argument on appeal given that it was on defendant's request that removal occurred. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Czybor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006). Additionally, although the removal was clearly precipitated by defendant improperly bringing counsel to a small claims case, given that both parties essentially asked for removal,⁷ we deem the removal to be an implicit stipulation to vacate the magistrate's order. "A party cannot stipulate to a matter and then argue on appeal that the resultant action was error." *Chapdelaine, supra* at 176. Accordingly, defendant is entitled to no relief.

Defendant next claims⁸ that its motion for relief from the MPCA judgment should have been granted based on the Supreme Court's opinion in *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). We review a trial court's ruling on a motion for relief from judgment for an abuse of discretion, and we may only set aside a trial court's findings of fact if

⁶ We address defendant's arguments in the order that seems most rational, although not in the same order as defendant raised them. We have used footnotes to indicate to which docket number each claim belongs. This first claim is from Docket No. 277916.

⁷ Plaintiff filed a motion to modify or vacate the small claims judgment, or alternatively to consolidate it with the district court case the same day that defendant asked for the removal, although it is unclear from the record which was filed first, as neither document has a filing stamp or appears on the docketing statement in the district court record.

⁸ Docket No. 284848.

they are clearly erroneous. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 364; 760 NW2d 856 (2008).

The MCPA includes an exemption for any “transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.” MCL 445.904(1)(a). Under MCL 445.904(4), this exemption can be claimed as an affirmative defense, but as with all affirmative defenses, if not timely pled in the first responsive pleading, an amended pleading, or in a motion for summary disposition, the exemption is waived. MCR 2.111(F)(3). In *Liss*, *supra* at 206-207, the plaintiffs filed an action against the defendant-residential builder for a violation of the MCPA. The defendant asserted that its residential-home-building transaction with the plaintiffs was exempt. *Id.* at 207. The Court held that a general transaction specifically authorized by law could consist of a license and regulation from a state or federal government. *Id.* at 213. The Court reasoned that contracting to build a residential home was specifically authorized by law under the Michigan Occupation Code (MOC) and regulated by the Residential Builders’ and Maintenance and Alteration Contractors’ Board, which oversees licensing and handles complaints filed against residential home builders. *Id.* Therefore, the defendant’s general conduct of residential home building was exempt from the MCPA because defendant was licensed and regulated.

Defendant argues that the sale and financing of a motor vehicle is governed by federal and state law, and that all auto dealerships must be licensed by the state in order to sell new or used vehicles under MCL 257.248(5). We need not decide this issue. Unlike in *Liss*, the argument that defendant is exempt from the MCPA was not timely raised as an affirmative defense. We reject defendant’s contention that this affirmative defense was adequately pled because it stated a failure-to-state-a-claim-upon-which-relief-could-be-granted defense. MCL 445.904(4) specifically places the burden of proving an exemption from the MCPA on the person claiming the exemption. Moreover, as stated in *Liss*, the MCPA exemption under MCL 445.904(1)(a) is an affirmative defense, which is waived unless the party asserting it raises it in the party’s first responsive pleading or a motion for summary disposition. See MCR 2.111(F)(3).

Defendant’s claim that, until *Liss* there was no defense, is meritless. The exemption is statutory, not judicially created and, therefore, preexisted *Liss*. Indeed, our Supreme Court noted that the defendant in *Liss* specifically pleaded that the MCPA was inapplicable:

Thus, § 4(1)(a) provides an affirmative defense, which is waived, unless the party raised it in the party’s first responsive pleading, as originally filed or as amended under MCR 2.118, or motion for summary disposition. . . . Defendants properly raised the exemption in their answer and counterclaim, as well as in their motion for summary disposition. [*Liss*, *supra* at 208, n 13.]

Defendant had the same opportunity to raise the exemption as did the defendants in *Liss*, but did not exercise that opportunity. Defendant’s claim that its failure to raise the defense should be excused because it was under no obligation to file affirmative defenses given that the claim was first raised in small claims court is not well taken. Defendant managed to claim other specific defenses, such as the UCC, evidencing its ability to claim defenses should it have found them applicable. This is not a case where defendant raised the defense in a subsequent pleading and the court made the determination that it was not raised timely. This is a case where defendant

failed to raise the defense entirely until the case was awaiting a grant of leave for its second level of appellate review. Defendant failed to raise the affirmative defense and, therefore, waived it. There is no error.

Defendant next argues⁹ that the district court erred in finding that the failure of Gary Kelly, a nonparty, to respond to a request to admit established a rescission. The trial court concluded in its opinion that:

The contract between plaintiff Barb Boillat (Ms. Boillat) and defendant Kelly Automotive Group (Kelly) was rescinded. This fact was supported at trial through the testimony of Ms. Boillat and Ms. Johnsonbaugh. It is proven conclusively by defendant Kelly's admission # 5.a.

We review a trial court's decision regarding evidentiary issues, such as admissions under MCR 2.312, for an abuse of discretion. *Hilgendorf v St. John Hosp & Med Ctr Corp*, 245 Mich App 670, 688; 630 NW2d 356 (2001).

According to MCR 2.312(B)(1), "[e]ach matter as to which a request is made is deemed admitted unless, within 28 days after service of the request . . . the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter." "A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D)(1); *Employers Mutual Casualty Co v Petroleum Equip Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). However, MCR 2.312 provides that a request for admission may only be served by parties on other parties.

Even so, we need not make a determination regarding Gary Kelly's status as a nonparty or an agent. Although the district court referenced admission #5.a, which was a question regarding rescission sent to Gary Kelly, the trial court referred to it as "defendant Kelly's admission." Defendant was also sent requests for admission by plaintiff that went ignored. Admission #6.a was, "Do you admit that this contract was rescinded, cancelled or otherwise terminated by you/Gary Kelly?" Thus, given that the trial court referred to "defendant's" admission, it seems likely that the reference to question #5.a was simply a clerical error.

Defendant did not make a motion to permit withdrawal and there was no response to the request for admission for defendant to amend. Therefore, defendant is deemed to have admitted that the contract between plaintiff and defendant was rescinded, cancelled, or terminated. See *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). Consequently, even if the trial court's reference to question #5.a was intentional, we conclude that the trial court reached the right outcome, albeit for the wrong reason, and affirm. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

⁹ Docket No. 277916.

Defendant further argues that even if the contract was rescinded, defendant did not violate MCL 445.903(1)(u). MCL 445.903(1)(u) provides that “[f]ailing, in a consumer transaction that is rescinded . . . in accordance with the terms of a . . . representation . . . to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment” is an unlawful act under the MCPA. Defendant first argues that no representation was made. This is disingenuous, as the record reveals that both plaintiff and Johnsonbaugh testified that Gary Kelly stated that he would rescind the contract with plaintiff and made a motion like he was tearing up the contract.

Defendant also argues that plaintiff was not entitled to a refund of her down payment because defendant never agreed to return it. The trial court found that the rescission of the contract entitled plaintiff to a refund of her down payment, stating:

Michigan law requires the return of deposited funds on rescission of a contract. Rescission of a contract is not merely a release; the contract is annulled from the beginning and the parties are restored to the positions they would have occupied if there had been no contract.

In *Lash v Allstate Ins Co*, 210 Mich App 98; 532 NW2d 869 (1995), this Court discussed contract rescission, stating:

To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the *status quo*. [*Id.* at 102-103, quoting *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479, 350 NW2d 283 (1984) (emphasis in original).]

In order for defendant to restore plaintiff to the status quo and put her in the position she would have been if no contract ever existed, defendant would have to refund plaintiff her down payment. Accordingly, the rescission of the contract entitled plaintiff to a refund, regardless of whether defendant specifically agreed to return it as a condition of the rescission. Because the record supports that there was a rescinded consumer transaction and plaintiff was entitled to have her deposit refunded, we find no error in the trial court’s conclusion that under MCL 445.903(1)(u), defendant’s failure to refund plaintiff’s deposit was a violation of the MCPA.

Defendant next argues¹⁰ that this Court should vacate or reduce the award of attorney fees granted to plaintiff under the MCPA. We review the trial court's decision to award attorney fees for an abuse of discretion. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003).

The award of damages under the MCPA is discretionary. The trial court abuses its discretion where it chooses an outcome falling outside a range of principled outcomes. *In re Baldwin Trust, supra*, 274 Mich App at 397. Here, the trial court reviewed the attorney fees and heard objections from defendant on both the rate and the amount of time spent preparing this case for trial. The trial court considered legal resources to determine the appropriate hourly rate, and reduced the hours charged, as well, resulting in a 37.5% percent reduction from plaintiff's original request. Additionally, we note that this defendant has previously engaged in similar conduct. That is, defendant takes claims filed in district court and appeals them up to the Supreme Court, thereby increasing attorney fees and costs to the plaintiff, and then argues that the attorney fees are "disproportionate to the amount involved and the results obtained." See *Beach v Kelly Automotive Group, Inc*, 482 Mich 1101; 757 NW2d 868 (2008). We refuse to permit defendant to run up the cost of litigation by exercising its right to appeal and then argue that plaintiff should not be entitled to the increased fees defendant's actions created. See *id.* ("I believe that the circuit court and the district court expressly and properly attributed the extraordinary fees to defendant's conduct" [Young, J., concurring]). Under these circumstances, we find that this result was reasonable, and that it was within the range of principled outcomes; the trial court did not abuse its discretion.

Defendant's final argument¹¹ is that the district court erred in awarding sanctions to plaintiff and the circuit court erred in allowing that award to stand, and in awarding additional sanctions. We review a trial court's decision whether to impose sanctions under the clearly erroneous standard. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

The district court did not state a basis for its award of sanctions to plaintiff. The circuit court determined that the award was clearly under MCR 2.114. The circuit court also awarded sanctions against defendant under MCR 2.114 because it concluded that defendant's continued appeals were filed for an improper purpose "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3).

Although we are concerned by what appears to be defendant's needless increase of litigation costs against plaintiff, we do not believe that defendant's appeal based on *Liss* was without merit. Parties are entitled to raise questions of the application of new precedent to their cases. In light of the fact that the application of *Liss* in the context of automotive sales has yet to be determined, we do not believe defendant had a completely insupportable position or that the outcome was "crystal clear." Accordingly, we find that sanctions were inappropriate.

¹⁰ Docket No. 277916.

¹¹ Docket Nos. 284848, 286024.

However, in both cases where sanctions were awarded, plaintiff had also moved for her attorney fees under the MCPA. Because all of defendant's continued appeals and new proceedings stemmed from the MCPA action, plaintiff was entitled to those attorney fees, MCL 445.911(2); *Lavene v Volkswagen of America, Inc*, 266 Mich App 470, 477; 702 NW2d 652 (2005), even if the trial court improperly awarded them as sanctions. Because the trial court reached the right result, albeit for the wrong reason, we affirm the award of plaintiff's attorney fees. *Hess, supra*.

Affirmed. Pursuant to MCR 7.219, plaintiff is entitled to costs.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro

EXHIBIT L

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation,

Plaintiff,

v.

MANDO AMERICA CORPORATION,
a Michigan corporation, TONY DODAK,
ABRAHAM GEBREGERGIS,
RAMAKRISHNAN RAJAVENKITASUBRAMONY,
CHRISTIAN ROSS, KEVIN ROSS,
TOMY SEBASTIAN, THEODORE G. SEEGER,
TROY STRIETER, JEREMY J. WARMBIER, and
SCOTT WENDLING, jointly and severally,

Defendants,

and

CHRISTIAN ROSS, KEVIN ROSS,
TOMY SEBASTIAN, THEODORE G. SEEGER,
and TONY DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation, LAURENT BRESSON,
and FRANK LUBISCHER,

Counter/Third-Party Defendants.

Case No. 13-021401-CK

Judge: M. Randall Jurrens (P27637)

**OPINION RE: MANDO'S
MOTION FOR LEAVE TO FILE
AMENDED ANSWER AND TO
COMPEL ARBITRATION**

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Mando requests leave to file an amended answer to interpose a pre-existing arbitration agreement with Nexteer, and to then compel arbitration of all of Nexteer's claims. Nexteer demurs, arguing the present litigation is beyond the scope of their agreement.

For the reasons stated in this opinion, the court concludes that Nexteer's claims are arbitrable.

Factual Background

Nexteer and Mando are both engaged in the development, manufacture, and sale of systems and components for the global automobile industry.

Effective June 1, 2012, Nexteer and Mando entered into a Non Disclosure Agreement ("NDA"), for the purpose of "considering the possibility of supplying components and subassemblies to each other". In order to implement this business relationship, Mando and Nexteer agreed to "exchange information, including documents and samples containing knowledge which is not in the public domain". Any information disclosed would be treated with "strictest confidentiality and not . . . accessible to third parties". The NDA confidentiality obligations continued "without limitation in time". Importantly, the NDA included the following language (emphasis added):

11. This Non-disclosure Agreement shall be construed and the legal relations between the Partners shall be determined in accordance with the substantive laws of Switzerland, with the exclusion of its law of conflict of law provisions. The United Nations Convention on Contracts for the International Sale of Goods (CISG) shall not be applicable.
 - a. As set forth in the Memorandum of Understanding, *any dispute, controversy or claim arising out of or in relation to this Nondisclosure Agreement*, including the validity, invalidity, breach or termination thereof, *shall be settled by arbitration* in accordance with the Rules of Arbitration of the International Chamber of Commerce in force on the date when the Notice of arbitration is submitted in accordance with these Rules.
 - i. The place of the arbitration is Geneva, Switzerland.
 - ii. The arbitration tribunal consists of three arbitrators.
 - iii. The arbitration proceedings shall be conducted in English.
 - b. The procedures specified herein shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Non-Disclosure Agreement; provided, however, that a Partner may seek a preliminary injunction or other preliminary judicial relief from a court with competent jurisdiction over the other Partner, if in its judgment such action is necessary to avoid irreparable harm or damages. Despite such action the Partners will continue to participate in good faith in the arbitration procedures specified above.

The parties' collaborative relationship terminated in August 2013. Shortly thereafter, on September 4-5, 2013, five of the individual defendants (all engineers, some high level, working on the next generation of electronic power steering) terminated their employment at Nexteer and began working for Mando. Subsequently, on September 11-13, 2013, the other five individual defendants left Nexteer for Mando.

Procedural Background

On November 5, 2013, Nexteer commenced the present litigation alleging nine causes of action: (1) breach of contract (against all individual defendants), (2) tortious interference with

business relationship/business expectations (against all defendants), (3) tortious interference with contract (against corporate defendant), (4) breach of fiduciary duty (against defendants Ross, Ross, Dodak, and Seeger), (5) aiding and abetting/knowing participation in breach of fiduciary duty (against corporate defendant), (6) violation of Michigan Uniform Trade Secret Act (against all defendants), (7) unjust enrichment/quantum meruit (against all defendants), (8) common law/statutory conversion (against all defendants), and (9) civil conspiracy (against all defendants). The NDA was attached to the Nexteer's complaint as Exhibit 4, with portions of ¶ 11 subparagraph "b" underlined. The NDA was also attached as Exhibit "E" to Nexteer's motion for temporary restraining order and preliminary injunction, which, in addition to underlining portions of ¶ 11 subparagraph "b", noted in the margin "Arbitration provision".

On November 15, 2013, the court conducted a hearing on Nexteer's request for a TRO, attended by Mando's then-attorneys of record, Baran and Horton, as well as Mando's in-house counsel, Taewoo Paul Nam.

On November 22, 2013, the court conducted a case management conference (by telephone conference call) in which Messrs. Baran and Nam participated on behalf of Mando. The conference included discussions regarding the existence and applicability of any arbitration agreement. The resulting Case Management Order ("CMO"), signed November 25, 2013, included the following provision:

17. **Arbitration** [MCL 691.1681 et seq., MCR 3.602]: An agreement to arbitrate this controversy ☐ does not exist ☐ is unknown ☒ exists ☐ is/will be the subject of a timely motion ☐ is waived ☒ is not applicable

Prior to entry, the court circulated the CMO to counsel via email for approval. With the exception of the timing for filing certain motions (¶ 15) which the court then amended, the parties' attorneys each registered their agreement by email.

On December 6, 2013, pursuant to leave granted in the CMO, Nexteer filed a First Amended Complaint and Jury Demand, but without substantively affecting the causes of action.

On December 19, 2013, Mando filed a motion for dismissal and for a protective order, asserting under MCR 2.116(C)(8) that Nexteer's amended complaint failed to state a claim upon which relief could be granted (but, notably, not a motion under MCR 2.116(C)(7) based on "an agreement to arbitrate or litigate in a different forum").

On December 20, 2013, the court conducted a status conference, by conference telephone, with attorneys Baran, Horton and Nam participating for Mando. The NDA arbitration agreement was not raised.

Nexteer's brief in opposition to Mando's motion to dismiss again attached a copy of the NDA (Exhibit "2"), again highlighting portions of the NDA ¶ 11.

On January 14, 2014, Mando filed a motion requesting the court admit Mando's in-house counsel, Georgia attorney Taewoo Paul Nam pro hac vice (which the court granted on January 24, 2014).

On February 26, 2014, following oral arguments and taking the matter under advisement, the court granted in part and denied in part Mando's motion to dismiss: dismissing claims for breach of fiduciary duty, aiding and abetting, unjust enrichment/quantum meruit, and common law/statutory conversion; limiting claims of tortious interference with business relationship/business expectations, tortious interference with contract, and civil conspiracy; and leaving unaffected claims for breach of contract and violation of the Michigan Uniform Trade Secrets Act.

On April 4, 2014, a second status conference was conducted by telephone in which attorneys Baran and Nam participated for Mando without raising the issue of arbitration.

On April 28, 2014, Mando filed motions for admission pro hac vice to allow New York attorneys Alexandra S. Wald, Mark D. Spatz, and Sang Min Lee to appear on its behalf (which the court granted on May 16, 2014).

On May 8, 2014, Mando filed the present motion for leave to amend its answer to, inter alia, assert arbitration as an affirmative defense and to compel arbitration of all claims.

On June 3, 2014, oral arguments were held and the matter was taken under advisement; with counsel invited to submit supplemental analysis addressing the court's concern that the issue of arbitration was moot as a result of the CMO, ¶ 17.

Analysis

Amendment Standards

MCR 2.118(A)(2) provides that, subject to inapplicable exceptions, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."

Michigan courts have interpreted subrule (A)(2) as ordinarily authorizing a party to amend its pleading, and have reasoned that a court should deny the opportunity to amend only for the following reasons: (1) undue delay by the moving party; (2) the moving party's dilatory motive or bad faith in seeking amendment; (3) the moving party's "repeated failures to cure deficiencies by amendments previously allowed"; (4) the granting of the motion to amend would cause the opposing party undue prejudice; and (5) futility of the proposed amendment. *Weymers v Khera*, 454 Mich 639, 658–659 (1997), quoting *Ben P. Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656 (1973).

Governing Arbitration Law

Mando asserts that the present arbitration issue is governed by Michigan's Uniform Arbitration Act, *MCL 691.1681 et seq.* ("MUAA"). Nexteer counters that the court should apply the Federal Arbitration Act, *9 USC 1 et seq.* ("FAA").

The FAA governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Allied-Bruce Terminix Cos, Inc v Dobson*, 513 US 265 (1995); *Burns v Olde Discount Corp*, 212 Mich App 576, 580 (1995). When applicable, state courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the FAA's substantive provisions. *Scanlon v P & J Enterprises*, 182 Mich App 347 (1990).

Given the global profile of both Nexteer and Mando, the court assumes the NDA constitutes a transaction in or affecting interstate commerce (although neither party has formally conceded or disputed this underlying issue). But even assuming the FAA controls this case in the event of conflict with the MUAA, neither party has demonstrated any material difference between the two at this juncture.

Arbitration Standards

Both state and federal policy favor arbitration "as an inexpensive and expeditious alternative to litigation." *Rembert v Ryan's Family Steak Houses*, 235 Mich App 118, 123 (1999).

When deciding whether an enforceable arbitration agreement exists, courts generally apply ordinary state-law principles that govern formation of contracts. *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944 (1995).

When determining the arbitrability of an issue, courts apply a three-part test: (1) is there an arbitration agreement in a contract between the parties; (2) is the disputed issue on its face or arguably within the contract's arbitration clause; and (3) is the dispute expressly exempted from arbitration by the terms of the contract. *In re Nestorovski*, 283 Mich App 177, 202 (2009); *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496 (1998);.

Arbitration agreements are to be liberally construed. Any doubt about the arbitrability of an issue should be resolved in favor of arbitration. *Campbell v Community Service Ins Co*, 73 Mich App 416, 419 (1977); *Moses H. Cone Mem Hosp v Mercury Constr Corp*, 460 US 1, 24 (1983).

Arbitrability of Dispute

Section 11(a) of the NDA provides (emphasis added):

[A]ny dispute, controversy or claim arising out of or in relation to this Nondisclosure Agreement, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce in force on the date when the Notice of arbitration is submitted in accordance with these Rules.

Mando asserts that, notwithstanding the original context of the NDA, Nexteer's current claims "arise out of" or "relate to" the NDA. Indeed, as Mando points out, Nexteer has repeatedly referenced the NDA to justify its request for relief (e.g. Amended Complaint, ¶¶ 134-

143, 152, 156, 177, 225, and 234, as well as its arguments against Mando's prior motion to dismiss).

Nexteer demurs, asserting that "the existence and nature of the [NDA] are simply background information about defendant's overall course of conduct" (Nexteer's Response to Mando's Motion to Amend, p 1). Moreover, Nexteer asserts:

None of Nexteer's claims asserts or depends upon whether Mando America breached the Non-Disclosure Agreement. Following amendments and refinements, Nexteer's complaint claims that (1) Nexteer's former employees – the individual defendants – breached their employment contracts; (2) Mando America tortiously interfered with those employment contracts; (3) Mando America and the former employees tortiously interfered with Nexteer's specific customer relationships and business expectancies; (4) all the defendants misappropriated Nexteer's trade secrets in violation of the Uniform Trade Secrets Act, MCL 445.1901; and (5) all the defendants conspired to engage in these torts. [(Nexteer's Response to Mando's Motion to Amend, p 2)]

However, this minimization appears markedly at odds with Nexteer's prior use of NDA-events to its advantage. In addition to ¶¶ 134-143 (separately entitled "Mando and Nexteer Enter Into a Non-Disclosure Agreement") that provide a historical framework to support subsequent allegations of wrongdoing, Nexteer's First Amended Complaint relies on NDA-related events to support various claims:

- ¶ 152 (under "Unable to Legally Gain Access to Nexteer's Product and Losing Market Share, Mando Resorts To Wrongful Actions In An Effort to Compete"):

During the April to August, 2013 timeframe, while the NDA was in effect and Nexteer and Mando were considering working with each other, Mando was actively and surreptitiously soliciting Nexteer employees to work for it. Although the purpose of the potential collaboration was clearly delineated, Mando, in violation of the terms and spirit of the NDA, utilized the potential collaboration to secure information on the key Nexteer employees, operations, products, and technology so that it could obtain the same for its own use.

- ¶ 177, Count II (Tortious Interference with Business Relationships and Business Expectations – Against All Defendants):

* * * Mando, by virtue of . . . the knowledge secured in regard to the NDA project, . . . know of Nexteer's relations and expectations with [Nexteer's] employees and clients.

- ¶ 225, Count VIII (Common Law and Statutory Conversion – All Defendants)¹:

¹ Although the court acknowledges this cause of action was dismissed by its February 26, 2014 Order, it nonetheless demonstrates how Nexteer's claims arise out of or relate to the NDA.

The Defendants are asserting and will continue to assert dominion over this property, wholly inconsistent with . . . the Non-Disclosure Agreement with Mando . . .

■ ¶ 234 Count IX (Civil Conspiracy – All Defendants):

In groups of two or more, the Defendants also acted in concert with the intent to achieve one or more of the following unlawful purposes:

* * *

- e. To surreptitiously solicit Nexteer employees and to secure Nexteer information and property during the NDA consideration process contrary to the purpose, spirit and language of the NDA agreement;

Nexteer further utilized the relation of the joint venture/NDA to fend off the defendants' efforts to dismiss its First Amended Complaint:

Losing bids for new work, losing market share, experiencing technical problems, lacking managerial know how, and having failed on the project seeking to incorporate Nexteer's advanced Modular Power Pack into its steering system, Mando resorted to desperate measures (148) It set out to steal Nexteer's trade secrets, business opportunities, confidential and proprietary information and other property by poaching the ten key employees who could give it that information, several of which employees worked directly with Mando on the MPP consideration project. Ending its joint partnership with Nexteer, it went after the key group involved under the NDA. Over a ten day period, from September 3, 2013 to September 13, 2013, all ten Individual Defendants abruptly resigned their employment giving no notice, and started working for Mando. (99, 107-116, 149) [Nexteer's Brief in Opposition to Defendants' Motion for Dismissal, p 6]

Moreover, during the January 24, 2014 oral arguments on defendants' motion to dismiss, Nexteer's expounded on how the present litigation arose out of/related to the parties' joint venture/NDA (Trans, pp 46-47):

As to the threaten[ed] misappropriation claim . . . they say that all we've alleged is that these employees worked for Nexteer and had accessed information and now they work for a competitor. We've alleged a lot more than that. We've alleged the whole scheme where Mando and the individual defendants surreptitiously worked together while Mando was Nexteer's partner, and the individual defendants were Nexteer's employees to create a competing operation and that spawns a lot of claims and that's duplicitous behavior.

A similar argument was advanced to avoid dismissal of the tortious interference claims [Nexteer's Response to Supplemental Brief of Mando Regarding Motion for Summary Disposition, pp 3-4]:

Here, Nexteer alleged that the Defendants engaged in a variety of duplicitous and unethical conduct. In particular, the complaint details how Mando participated in a premeditated scheme to encourage and capitalize on the disloyalty and deceptiveness of key Nexteer employees in an effort to go from last place among the major North American steering suppliers to a much more competitive position. The allegations include that:

- Mando entered the Non-Disclosure Agreement to collaborate as Nexteer's partner in a joint-venture that had the effect of substantially upgrading its overall system, (See Compl ¶ 134 and Ex 4);
- Under that agreement, Mando could not use the information it learned for any purpose other than advancing the two companies' joint interest in that venture, (135-142);
- Prior to and during the agreement, the proprietary software and electronics in Nexteer's Modular Power Pack (which is a key technology that cannot be legitimately reverse-engineered) and its Electronic Power Steering System gave it a unique competitive advantage that made it the leading North American supplier of EPS systems, (23-25, 92-93);
- Mando and the Individual Defendants misused the joint-venture and confidentiality agreement in a disloyal scheme to take that technology and the particular business relationships and expectancies that went with it, (120, 124, 148, 152); and
- The background circumstances suggest an unethical and wrongful scheme, including that after Mando lost a project to Nexteer, it used the joint-venture relationship to heavily recruit Nexteer's key employees, to tailor its job descriptions to fit employees that it only learned about through that relationship, and to encourage those key employees to violate their non-solicitation agreements with Nexteer by recruiting fellow employees, (123, 127-132, 150).

With due respect, this is not mere "background". Rather, the NDA/joint venture is an integral part of Nexteer's current dispute with Mando. Indeed, these allegations form necessary elements of Nexteer's misappropriation and tortious interference claims, without which they would have been subject to dismissal. *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125 (2002). Accordingly, the court concludes that the present dispute is "arising out of or in relation to" the NDA.

To the extent that some of Nexteer's claims may not be as clearly subject to the NDA arbitration agreement as others, the court notes the strong public policy in favor of arbitration of all related disputes.

The policy in favor of this expeditious alternate to the judicial system is thwarted if all disputed issues in an arbitration proceeding must be segregated into categories of “arbitrable sheep and judicially-triable goats”. * * *

It is to prevent this dissection of claims that [courts] liberally construe arbitration clauses resolving all doubts about the arbitrability of an issue in favor of arbitration. [*Detroit Automobile Inter-Insurance Exchange v Reck*, 90 Mich App 286, 289-290 (1979) (internal citations and quotations omitted)]

Thus, “there is a presumption of arbitrability unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234-235 (1998). Here, there is nothing in the arbitration agreement expressly exempting any portion of Nexteer’s present claim from arbitration. As observed in *First Options of Chicago, Inc v Kaplan*, 514 US 938, 945 (1995) (internal citation omitted),

the parties likely gave at least some thought to the scope of arbitration. And, given the law’s permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter.

There being an arbitration agreement between Nexteer and Mando, with disputed issues appearing within the contract’s arbitration clause, and there being no exemption of any dispute by the terms of the contract, the court concludes that Nexteer’s claims are arbitrable.

Non-signatories

An agreement to arbitrate is a matter of contract. *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 458 (2006). It goes without saying that a contract cannot bind a nonparty. *EEOC v Waffle House, Inc*, 534 US 279, 294 (2002). However, nonsignatories may nonetheless be bound to an arbitration agreement under ordinary contract and agency principles such as incorporation by reference, assumption, agency, veil-piercing/alter-ego, and estoppel. *Javitch v First Union Securities, Inc*, 315 F3d 619, 628-629 (CA 6, 2003).

Here, where, according to Nexteer, “the individual defendants surreptitiously worked together while Mando was Nexteer’s partner, and the individual defendants were Nexteer’s employees to create a competing operation and that spawns a lot of claims”, extending arbitration to claims against non-signatories appears appropriate under ordinary agency principles.

Moreover, the individual defendants have expressly consented to arbitration of Nexteer’s claims against them.²

² See Individual Defendants’ Supplemental Brief Regarding Mando’s Motion to Arbitrate.

Waiver

A waiver is a voluntary and intentional abandonment (or relinquishment) of a known right. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003); *Simms v Bayer Healthcare LLC*, __ F3d __ (CA 6, 2014)³. However, as observed in *Burns v Olde Discount Corp*, 212 Mich App 576, 582 (1995) (citations omitted),

[W]aiver of a contractual right to arbitration is not favored. A party arguing there has been a waiver of this right bears a heavy burden of proof. The party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts.

Here, the November 25, 2013 Case Management Order (the “CMO”) provides:

17. **Arbitration** [MCL 691.1681 et seq., MCR 3.602]: An agreement to arbitrate this controversy ☐ does not exist ☐ is unknown ☒ exists ☐ is/will be the subject of a timely motion ☐ is waived ☒ is not applicable

This provision was the result of telephone conference discussions with then-counsel of record, and was entered only after circulation to counsel for review and comment. It documented counsels’ acknowledgement of the existence of the NDA’s arbitration provision, but collectively, consciously concluded that it did not apply to the present litigation.

Mando, however, argues (1) its then-attorneys did not sufficiently understand, (2) the CMO was only preliminary, (3) the CMO did not indicate that arbitration was “waived”, (4) the CMO expressly reserved any decision on ADR, and (5) the case was not then sufficiently developed to be able to see how the arbitration agreement applied. With due respect, the court finds the arguments disingenuous.

First, Mando’s Michigan attorneys are professional, respected, knowledgeable, experienced business/commercial trial attorneys. Moreover, these able local advocates have, from the beginning, been supplemented by Mando’s Georgia-based corporate counsel (admitted to appear in this case by special Order) who is uniquely positioned to appreciate the client’s history with Nexteer.

Second, the CMO, quite intentionally, occurs in the early stages of litigation. However, as contemplated by MCR 2.401(B), it is intended to facilitate the long-term progress of the case. By opening the document with “the court being preliminarily advised of the following”, the court did not make a “preliminary” Order but, rather, merely documented the parties’ “preliminary” statement of their claims, defenses, relief requested, and stipulated facts/documents, that then formed the foundation for the following court orders. Mando has demonstrated nothing in the course of the case management conference, and nothing in the resulting CMO, limiting its context or application. It is, for a reason, denominated a “case” management order.

³ *Simms* is notable, in part, for its application of the waiver doctrine in the context of a trial court’s case management order; although, unlike here, the objection was not raised until the end of the process.

Third, the CMO did not indicate that arbitration “is waived” because waiver assumes an applicable arbitration agreement existed. Here, the parties agreed the arbitration agreement “exists” but that it “is not applicable”. It would seem inconsistent to “waive” an agreement that is “not applicable”.⁴

Fourth, although paragraph 18 of the CMO provides “This case is not presently being submitted to any form of ADR, but may be subsequently”, the provision is prefaced by reference to MCR 2.410 which governs forms of alternative dispute resolution that proceed ancillary to pending litigation. This is readily distinguishable from an arbitration agreement that constitutes “disposition of the claim before commencement of the action”, *MCR 2.116(C)(7)*, that is commonly governed by MCR 3.602 and, moreover, here, is specifically addressed in ¶ 17 of the CMO.

Finally, although the case management conference occurred prior to Nexteer’s amended complaint, the new pleading did not materially change the legal landscape: i.e. the amended complaint contained the same nine causes of action and the abundant references to and attachment of the NDA (including its highlighted arbitration clause).

Admittedly, no party raised the CMO’s application to Mando’s present motions. Nonetheless, the court was and remains legitimately concerned with the integrity of a process that regularly depends on counsels’ representations. The matter was discussed during the conference and all participating attorneys agreed the NDA’s arbitration provision did not apply. The Order was circulated to counsel before signature. Even upon opportunity to reflect, no objections were received.

However dismayed, the court recognizes that an effective waiver requires not only “knowledge of an existing right to compel arbitrate, [and] acts inconsistent with the right to arbitrate, [but, also] prejudice resulting from the inconsistent acts.” *Burns, supra*.

Here, Nexteer argues prejudice is manifested by its reliance on Mando’s “waiver” and its investment of “tens of thousands of dollars or more to prepare briefs and motions to be filed in this [case]” (Nexteer’s Supplemental Brief As To Mando’s Waiver of Arbitration, pp 3-4). The court appreciates Nexteer’s concern over the cost of commercial litigation, particularly in this case where each corporate party, including Nexteer, has elected to engage multiple law firms. Hopefully, Nexteer may find some consolation in arbitration’s ability to bring “final disposition of differences between parties in a faster, less expensive, more expeditious manner than is available in ordinary court proceedings.” *Joba Const Co, Inc v Monroe Cnty Drain Com’r*, 150 Mich App 173, 179-180 (1986). In any event, the case has not yet wholly emerged from the pleading stage, and discovery in this complex case remains embryonic. Under the circumstances, the court is not persuaded Nexteer has suffered prejudice sufficient to overcome a presumption in favor of arbitration. *Hurley v Deutsche Bank Trust Company Americas*, 610 F3d 334 (CA 6 2010)⁵; *Madison District Public Schools v Myers*, 247 Mich App 583 (2001)⁶.

⁴ Indeed, as the court recalls, the original Case Management Order template had to be modified -- with insertion of a new option, “is not applicable” -- to account for the unusual circumstances of this case where, although counsel recognized the existence of the NDA, they collectively concluded it did not apply.

⁵ In *Hurley*, the federal appellate court affirmed the district court’s determination that the defendant waived its agreement to arbitrate by actively participating in litigation for over two years and waiting until after the court

Leave to Amend Answer

Nexteer argues that its present claims are outside the scope of the NDA's arbitration clause and, accordingly, allowing Mando to amend its answer to interpose it as an affirmative defense would be an unjustified exercise in futility.

However, as analyzed above, the court concludes that Nexteer's claims are arbitrable. Accordingly, in the absence of a persuasive reason to the contrary, MCR 2.118(A)(2) requires Mando be afforded the opportunity to amend its answer to Nexteer's first amended complaint. *Weymers, supra*.

Relief

In addition to requesting leave to file an amended answer to interpose the arbitration agreement, Mando's motion also requests the court enter Orders to (1) compel Nexteer arbitrate its claims, and (2) stay this litigation pending the completion of arbitration.

With regard to compelling arbitration, § 4 of the FAA, 9 USC § 4, provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. * * * ^[7]

And with regard to staying litigation pending conclusion of arbitration proceedings, § 2 of the FAA, 9 USC § 3, provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an

entered an unfavorable decision, but also causing the plaintiff actual prejudice by incurring costs attendant to extensive discovery, four summary judgment motions, and a change of venue.

⁶ In *Madison*, where the plaintiff extensively litigated its claims for 20 months (but which ultimately suffered dismissal of its complaint) before demanding arbitration under the parties' pre-existing written agreement, the appellate court deemed the elements of waiver clearly established and concluded, "We will not sanction plaintiff's utilization of the court system, with its scarce resources, merely to test the judicial waters until it received an unfavorable ruling. . . ."

⁷ The MUAA, § 7, *MCL 691.1687*, similarly provides:

- (1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate under the agreement, the court shall do both of the following:
 - (a) If the refusing party does not appear or does not oppose the motion, order the parties to arbitrate.
 - (b) If the refusing party opposes the motion, proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.^[8]

Accordingly, the court being satisfied that the issues involved in this litigation are within the scope of the NDA's arbitration clause, and Nexteer having indicated a "failure, neglect, or refusal" to arbitrate under a written agreement for arbitration, it appears appropriate to enter an order directing such arbitration proceed; and, pending completion of the arbitration, to stay trial of Nexteer's claims.⁹

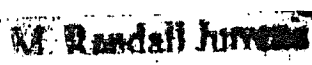
Conclusion

Mando requests leave to file an amended answer to interpose Nexteer's written agreement to arbitrate "any dispute, controversy or claim arising out of or in relation to" the parties' prior joint venture, and to then compel arbitration and stay litigation of Nexteer's claims. Nexteer demurs, asserting that the present litigation falls outside the scope of its agreement to arbitrate.

The court concludes that (1) Nexteer's claims are arbitrable, (2) Mando should be granted leave to file its proposed amended answer, (3) Nexteer's claims should be referred to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (per the NDA, but to be conducted within the Eastern District of Michigan in accordance with the FAA), and (4) the present litigation of Nexteer's claims should be stayed.

Upon presentment in accordance with MCR 2.602(B), the court will sign an Order that comports with this opinion.

Date: JUL 10 2014


(P27637)
M. Randall Jurrens, Circuit Judge

⁸ The MUAA, § 7, *MCL 691.1687*, similarly provides:

If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

⁹ This stay of the litigation extends to Nexteer's claims only and does not, in and of itself, stay the individual defendants' efforts to assert counter/third-party claims against Nexteer and Messrs. Lubischer and Bresson. Those claims are not formally before the court and, if not placed into the arbitration process and/or stayed by the parties' stipulation, remain an open subject at this time (particularly in light of the recently filed Counter/Third-Party Plaintiffs' First Amended Counterclaim and Third-Party Complaint Against Nexteer Automotive and Third-Party Defendants). In this regard, the court notes the "First Five" have signaled their willingness to "stipulate to stay their Amended Counterclaim pending the resolution of the arbitration so as to avoid litigating the same claims simultaneously in separate forums" (see Individual Defendants' Supplemental Brief Regarding Mando's Motion to Arbitrate, p 2). However, in the absence of a formal stipulation or other appropriate action to resolve this open question, the court anticipates conferring with applicable counsel in the near future.

EXHIBIT M

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STATE OF MICHIGAN

IN THE 10th JUDICIAL CIRCUIT COURT FOR SAGINAW COUNTY

NEXTEER AUTOMOTIVE,

Plaintiff,

vs.

Case No. 13-21401-CK

MANDO AMERICA CORPORATION, et al

Defendants. /

DEFENDANTS' MOTION TO DISMISS

BEFORE THE HONORABLE M. RANDALL JURRENS, ACTING CIRCUIT JUDGE

SAGINAW, MICHIGAN - Friday, January 24, 2014

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WITNESSES: PLAINTIFF PAGE:

None

WITNESSES: DEFENSE

None

EXHIBITS: IDENTIFIED: RECEIVED:

None

1 Saginaw, Michigan

2 Friday, January 24, 2014 - 10:29 a.m.,

3 THE COURT: Court will take up the matter of Nexteer
4 Automotive versus Mando America, Circuit Court case number
5 13-21401-CK. Good morning.

6 MR. SHEA: Good morning, Your Honor.

7 MR. HORTON: Good morning, Judge.

8 MR. WATSON: Good morning, Your Honor.

9 THE COURT: Appearances of counsel, please.

10 MR. WATSON: Jerome Watson appearing on behalf of
11 Plaintiff Nexteer. And I'm here with Mr. Benedettini and
12 other members of Nexteer's in-house legal staff, Judge.

13 THE COURT: Welcome.

14 MR. HORTON: Good morning, Judge. William Horton
15 and Andrew Baran on behalf of Defendant Mando.

16 MR. SHEA: Your Honor, David Shea on behalf of the
17 individual defendants.

18 MR. KALTENBACH: Your Honor, Pat Kaltenbach on
19 behalf of the individual Defendants, five of them.

20 THE COURT: I believe the first order of business
21 today is the Motion for Temporary Admission to the Bar for
22 Mr. Nam. Mr. Horton.

23 MR. HORTON: Thank you, Judge. I--I know that
24 we've filed with the Court, the motion, and I understand that
25 the State Bar and the Attorney Grievance Commission have

1 provided the appropriate documents to the Court. I would
2 move for the admission of Taewoo Paul Nam, he's a member of
3 the Georgia Bar and is counsel for Mando out of state. We
4 would like to move for his admission Pro Hac Vice in this
5 case.

6 THE COURT: In reviewing MCR 8.126, the only issue
7 that I thought might be missing I think is easily resolvable.
8 There was to be a letter from the State Bar showing the fee
9 paid. If you have a copy I would like one.

10 MR. HORTON: We do, Judge. I--I assumed you
11 received the letter from the Attorney Grievance Commission?

12 THE COURT: I did and I made reference to the
13 letter, so I knew it existed.

14 MR. HORTON: We have it here somewhere.

15 THE COURT: And then do you have a proposed order.

16 MR. HORTON: Pardon me?

17 THE COURT: Do you have a proposed order?

18 MR. HORTON: I believe there was one attached to
19 the motion. If there was not, I'll submit it. We just looked
20 at it just a minute ago.

21 THE COURT: The order was attached as an exhibit.
22 I didn't see a free standing order to sign.

23 MR. HORTON: Can I approach, Judge? I've got the...

24 THE COURT: Yes. And then Mr. Watson, counsel,
25 any--any comment on the motion?

1 MR. WATSON: We have no objection, Judge.

2 THE COURT: And, Mr. Horton, this letter is for me
3 to keep or can I make a copy?

4 MR. HORTON: Either one, Judge. You can have it.
5 It's for your file.

6 THE COURT: And, Mr. Nam, anything you'd like to
7 say before I sign the order?

8 MR. NAM: No, sir.

9 THE COURT: So I signed the order and Mr. Nam is
10 now admitted to practice law in the State of Michigan for
11 purposes of this case.

12 MR. HORTON: Thank you, Judge.

13 THE COURT: And I'll make copies of the orders and
14 distribute later. And this is the date and time set for the
15 Defendants' Motion to Dismiss under MCR 2.116(C)(8). If you
16 would you live to proceed.

17 MR. HORTON: Thank you, Judge. In our dealings with
18 the Court so far we're--we're certainly aware that the Court
19 is well-versed and reads these papers thoroughly. I'm not,
20 certainly not going to burden the Court with reiterating
21 everything we said. What I would like to do is really
22 address four or five points that I think highlight our
23 motion. As the Court indicated it's a (C)(8) motion, relies
24 on the pleadings.

25 Basically, Judge, the summary is as pleaded by the

1 plaintiff, these at-will employees, not subject to a non-
2 compete who are free to prepare to compete, and in fact to
3 compete. We believe as I'll address in a moment that the
4 anti-solicitation clause in the 2009 contract does not apply.
5 Fundamentally they only have a trade-secrets case with a
6 contract claim for confidentiality. But we believe at the
7 end of the day the trade secret claim and the contract claim
8 is not properly pleaded. If I can address, take each one of
9 those points and address them if I can?

10 First, I'd like to address the 2009 contract versus
11 the 2010 contract. If you recall the 2009 contract has what
12 I call the anti-solicitation clause in it. 2010 contract
13 does not.

14 Judge, as we indicated in our, both in our motion
15 and our reply brief, the 2010 contract has all of the
16 elements..., by the way it is attached to the complaint so it
17 is part of the pleadings, has all of the elements of the
18 contract. We identified the five elements and went through
19 each one of them. And it certainly seems as in our opinion
20 that based on their document attached to their complaint that
21 it is in fact the contract contains an integration clause,
22 which says it is the only contract between the parties and
23 does not of course contain the anti-solicitation clause.

24 And one of the things I thought was interesting
25 also, Judge, is that I--I pulled out the 2009 contract and

1 took a look at the last page of that. And it--it
2 specifically says that the 2009 contract..., and I'll read it
3 to ya. It's the very last paragraph of the 2009 contract.
4 It says: ...this agreement remains in effect until its
5 cancellation or until its replacement or amendment by another
6 duly executed written agreement.

7 So first we believe that certainly the 2010
8 contract is:

9 A. in fact a contract.

10 B. has an integration clause that would nullify
11 any prior contracts.

12 And secondly, pursuant to the terms of the 2009
13 contract, Nexteer did exactly what it said it was going to
14 do. It replaced the 2009 contract with another contract and
15 that is the 2010 contract.

16 So, Judge, I think the law is clear on three
17 points:

18 One, as we've discussed previously when we were
19 here on the Kahn case and cases of that ilk, which basically
20 says that when you have a later contract that covers the same
21 subject matter supersedes the prior one. We certainly
22 believe that that is the law and--and the application of it
23 to these facts would say that the 2009 contract does not
24 apply.

25 Secondly, that the integration clause in the 2010

1 contract nullifies..., and the reason I raise this, Judge, is
2 that Nexteer has quibbled with us about whether they..., and I
3 don't mean that in a deprecating way at all. They've--
4 they've argued in their papers that the 2009 contracts and
5 2010 contracts deal with different subject matters. And we
6 could argue about that all day long. I don't think it does.
7 It says you're an at-will employee. It says these are the
8 terms and conditions of your employment. It's exactly the
9 same subject matter. But regardless of that the integration
10 clause, and no law to the contrary, the integration clause
11 nullifies prior contracts regardless of the subject matter.
12 So that when you have a contract that says, this governs our
13 relationship and there are no prior agreements, you could
14 have an agreement on a totally different subject matter. But
15 that integration clause nullifies that prior agreement. No
16 law that I'm familiar with to the contrary.

17 The third thing, Judge, is just what I mentioned to
18 you. That is that pursuant to the terms of the 2009
19 agreement Nexteer did just exactly what it said it would do
20 to replace the 2009 agreement. The 2009 agreement says, its
21 operative until replaced or cancelled. It was replaced or
22 cancelled. So this is--this is a document of their own
23 making for the three reasons that--that I've mentioned I
24 don't think the 2009 agreement is operative. The 2010
25 agreement is the only one that's operative. Obviously it

1 does not contain the anti-solicitation clause. So to the
2 extent that that is part of their breach of contract claim,
3 that should be dismissed. And--and by the way they, I think
4 they in general carry that argument through each one of the
5 other counts. And so it would not be properly in anyone of
6 those other counts.

7 The second point, Judge, is related to the
8 preemption of any tort claims alleging misappropriation of
9 trade secrets. That applies to everything except Count 1.
10 Count 1 is a contract claim. Count 6 is the--the trade
11 secret claim, that's the claim under the Michigan Uniform
12 Trade Secret Act. So we're talking about all the other
13 counts, because all of the other counts are tort claims. And
14 they-- as we've indicated as we went through the, their
15 complaint I think that we've tried to indicate to you in our
16 papers that each one of those other counts: one, is a tort
17 claim, two, claims that there is trade secrets that were
18 misappropriated. And as the not only the Michigan Courts
19 but a number of courts from throughout the country, I think
20 there's 47 states that have adopted the uniform act that
21 said, here's the whole idea behind the Uniform Trade Secret
22 Act, let's get rid of all these other counts, let's get rid
23 of all these claims. It all falls under the trade secret,
24 the Uniform Trade Secret claim, the statutory claim. And
25 that's what the legislature did in 1998. They've cited some

1 law from the 70s and the 80s that may have been fine law in
2 the 70s and the 80s. But in 1998 the Michigan Legislature
3 enacted a statute that said everything else that relates to
4 misappropriation of trade secrets it out except for the claim
5 under the Michigan Uniform Trade Secrets Act. And I could go
6 through each one of them if the--if the Court desires. But I
7 know that, like I said the Court had--reads these papers, and
8 you know I'll just highlight a couple of them.

9 For example, I believe they say on--on conversion
10 for example, they say we, you know you converted our things.
11 And so when we--you go into the actual complaint and you
12 actually look at what it is they say is converted. They say
13 it's our information. It's our information related to
14 electric power steering or information related to MPP which I
15 can't remember what that that acronym stands for. Well
16 basically they--they say that, and unfortunately I've had a
17 lot of experience with conversion in both trial courts and
18 the Court of Appeals. And essentially what conversion is
19 it's the civil tort for stealing personal property. Best
20 example is, I go--I drive past your house, I see your garage
21 door open, nice set of golf clubs sitting in there, I go in
22 there and take it. It's the civil tort where you sue me and
23 say I took your stuff. Well so what is the stuff that
24 plaintiff says that we took in this case? What they say we
25 took in this case is information. And that's exactly what

1 the--the statute says is preempted in cases from around the
2 country I cited, well one is from Michigan as well as
3 throughout the country that say that is exactly the intent of
4 the Michigan Uniform Trade Secret Act is that those claims
5 are preempted. And if you look at their complaint, Judge,
6 that is the theme that runs through each one of the counts.
7 And you'll notice in our motion we didn't move on the basis
8 of preemption as to Count 6, because it would properly be
9 there, in 6. And we didn't move on this basis on Count 1
10 which is breach of contract claim because that's specifically
11 exempted from the preemption statute. But if you look at all
12 the other counts, they're all tort claims. And the--the
13 thread that runs through it, the words that they use in the
14 complaint are that we took trade secrets information,
15 confidential information, proprietary information, every
16 other iteration of basically that term. And those are the
17 things that are preempted.

18 I would like to address just a couple of things
19 related to some of those individual counts. And one of the
20 ones that I would like to address is that the breach of
21 fiduciary duty. I took a look at that, again is that if you
22 take a look at their claim for breach of fiduciary duty,
23 first, you have to analyze how that, what the facts and
24 circumstances are that relate to how that duty may arise.
25 And if you take a look at the--at the count..., I didn't write

1 down the paragraph number but I can if the Court wishes. But
2 there's only one paragraph that relates to how they say that
3 duty arises. And here's---and here's what my understanding of
4 the law is:

5 First, by statute, if you're a corporate officer or
6 director you owe fiduciary duty. These people are not
7 corporate officers or directors. So then you go to the
8 common law and what the Supreme Court has indicated are the
9 facts and circumstances related to how you make an allegation
10 quite frankly as to how a fiduciary duty arises. Plaintiff
11 recites some general law that says a fiduciary duty is one
12 where you're trust and confidence resides in another person.
13 That's a--that's a fine general statement. But that isn't the
14 specific claim that has to be made according to the Supreme
15 Court. And they identified those four circumstances where...
16 if I can get to it here. And, Judge, by the way the
17 paragraph in their complaint is paragraph 194. They just say
18 that they were trusted, high level employees and they relied
19 upon them to play integral parts in running the future
20 engineering group. They had access to proprietary Nexteer
21 business information. That's the--that's the extent of the
22 allegation of the relationship of trust and confidence. And
23 here's what the Supreme Court says that you have to do under
24 the--the four elements. They say, you know,

25 One, is that a person places trust in the faithful

1 integrity of another who has a result gain superiority or
2 influence over the first. No allegation in their complaint
3 in that regard.

4 The second one when one person assumes control or
5 responsibility over another. Certainly no allegation related
6 to that.

7 Three, when one person has a duty to act or give
8 advice to another on matters falling within the scope of the
9 relationship. No allegation regarding that either, Judge.

10 And fourth, when there has been a specific
11 relationship that has traditionally been recognized as
12 involving fiduciary duty, such as a lawyer or stock broker.
13 And clearly there's no allegation related to one of those
14 traditional relationships.

15 THE COURT: And the cite you have for that is?

16 MR. HORTON: It's in our reply brief, Judge, on
17 page 8. It's *Karmey-Kupka* K-a-r-m-e-y hyphen K-u-p-k-a
18 versus *Karmey* K-a-r-m-e-y, 428 Mich 68, and it's on page 8 of
19 our--of the reply brief.

20 And, Judge, that is, you know, if you look at what
21 their allegations are, again, this is--this is on their
22 pleadings this document they wrote, they say you are high
23 level employees and we place trust and confidence in you.
24 Simply not enough, Judge. A couple of the other ones that I,
25 I would like to address is that they responded and said for

1 example on unjust enrichment. The basis of our motion was,
2 look, when there's a contractual relationship between the
3 parties you can't have a claim for unjust enrichment. And
4 they cite a couple of cases and they say well in those cases
5 they found that the unjust enrichment count did survive a
6 motion to dismiss, but not when you read the details of the--
7 of those cases. For example in *Wysong*, the unjust enrichment
8 count did survive but there was not a contract claim. There
9 wasn't a contract count in that case. And I quoted to the
10 Court you know the counts that that there were there in that
11 case, misappropriation of trade secrets, conspiracy, unjust
12 enrichment, breach of fiduciary duty, deceptive packaging and
13 breach of duty and loyalty. No claim related to a contract.

14 The other one which is a Michigan Supreme Court
15 case the *Hayes-Albion* case which is a pre MUTSA, pre uniform
16 trade secret act case related to trade secrets. They cite
17 that and they say well yeah you found, the Supreme Court in
18 that case found that unjust enrichment claim survived. But
19 when you read the case, here is what it actually says..., there
20 were multiple defendants, there were four defendants, there
21 was Kuberski, there was Lunger, Erie Tool and National
22 Pattern. The unjust enrichment count survived against
23 Lunger, Erie Tool and National Pattern because there was no
24 contract with the plaintiff. But they dismissed the count,
25 the unjust enrichment count against Kuberski because there

1 was a contract with Kuberski.

2 So you know these are the distinctions, Judge, that
3 make a difference. At the end of the day what you--what you
4 fundamentally have is that they were the master of their
5 complaint. They drafted it in--in this fashion and in fact
6 they haven't met the elements of the counts that they have
7 pleaded.

8 The--if I can just address a couple of the
9 additional counts, and that is that they have aiding and
10 abetting, breach of fiduciary duty and conspiracy. These are
11 derivative claims. In other words these are not stand-alone
12 claims. They admit that they're not stand-alone claims. And
13 so unless you have obviously aiding and abetting/fiduciary
14 duty can't survive unless there is a claim for breach of
15 fiduciary duty. So our argument in that regard is pretty
16 simple. These two counts are derivative from the other
17 counts. And the other counts don't survive.

18 I--I would like to, so, Judge, my point is on these
19 is that first all of these non-contract tort claims are
20 preempted by MUTSA. But even in the event that they weren't,
21 which I don't think is the case, they still don't survive
22 because they haven't met the pleading elements required by
23 law.

24 Let me address if I can the--the trade secret
25 count, and really the, it goes to the contract count related

1 to the alleged misappropriation of confidential information
2 under the contract. And, you know, a lot of times the
3 allegations of what these trade secrets are, are just too
4 vague. Now a lot of times there might be an inclination for
5 the Court to say, you know that's interesting, you guys can
6 just figure this out during discovery. But there is a
7 distinction because you have to be put on notice as to
8 exactly what it is that you're defending. And--and I think
9 looking at what they've alleged and what the cases that both
10 parties have cited the--the details of those are illustrative
11 as to why the plaintiff's complaint is not sufficient here.
12 And I wrote down what they said we allegedly have taken. And
13 this is, to me it's the epitome of vagueness and generalness.

14 Here's literally what they say, its paragraph 154.
15 And--and quite frankly, Judge, they don't even say we took
16 it. What they say is and I'm quoting, it says: All of the
17 Nexteer engineers had access to..., "had access to". Didn't
18 say we took it.

19 They just said that we have access to the following
20 six items, source code. It's computer code. I mean I'll
21 just identify then I'll tell you what, why I believe that
22 these are far too vague to survive. They say source code,
23 drawings and specifications, supplier pricing, contracts,
24 Nexteer pricing, terms and conditions of Nexteer's work.

25 Source code - it's computer code. They say it's

1 some kind of computer code. Now, you know I'm certainly not
2 an engineer about electric power steering. But I am quite
3 confident there is an awful lot of technology. A lot of
4 computer code in power steering just like there would be in
5 the navigation system, just like there would be in the airbag
6 system, just like there would be in the transmission, the
7 electronic ignition, all sorts of things. To say source
8 code is to say that a computer has source code. It has no
9 definition whatsoever. It has no meaning. And it--it's just
10 not a fair statement in order to put us on notice as to what
11 it is that we have to defend.

12 Secondly, Judge, drawing and specifications.
13 Drawing and specifications of what? I mean this is the
14 height of generic pleading in my opinion.

15 Supplier pricing. Again, I have no idea what that
16 means.

17 Nuts and bolts. You know I think one of our, and
18 the reason that that's important is that our defenses and
19 affirmative defenses may depend on what that means and we
20 have to recite those things now. So for example they're
21 talking about nuts and bolts, my argument would be that isn't
22 confidential. I can call up the nuts and bolts company and
23 say, What do you charge for nuts and bolts? And they'll tell
24 me. If they tell me it's not secret and it can't be
25 confidential and it can't be the subject of a trade secret or

1 confidentiality claim.

2 They say contracts. I mean contracts? That--
3 that's quite literally what it says, "contracts".

4 Nexteer pricing. My experience in handling trade
5 secret cases is that pricing is almost never a trade secret
6 because you have to disclose it to the customer. When you
7 disclose it to a third party it's no longer a trade secret.
8 So I need to know what it is these--these things are that
9 they are saying so that I can form my defense and form my
10 pleadings which I have to do now in order to address these
11 items.

12 Terms and conditions of Nexteer's work. Again is
13 vague as general as they come. And, Judge, that's why I went
14 into the cases that we cited and they cited in our reply
15 brief to try to give you very specific contrast. Here is
16 cases where the court said the pleading was sufficient. Here
17 is cases where the court said it wasn't sufficient. And I
18 took a look at what it was that the Court was addressing.
19 And you'll see when we talk about those items that they're
20 much more detailed than what plaintiff has given us in this
21 case. So for example, you know, one of the ones I, they
22 spent a fair amount of time on the *Compuware* case, and I did
23 two things related to that:

24 One is that I read the case, it relates to a
25 specific kind of software called File-Aid. And I actually

1 went on the, I'm kind of familiar with--with it to be begin
2 with, it's a very specific kind of software product. If you
3 read the case it says that the source code was attached to a
4 patent application and filed in the patent office. And the
5 allegation was that the defendant had read it in the patent
6 office and copied it, very specific. And obviously they had
7 the exact details of what the source code were.

8 If you take a look at the *Uniroyal* case: Again, the
9 allegations that the plaintiff made in that case and that the
10 court said were sufficient were..., I'm quoting this, this is
11 on page 10 of our brief. It says aggregate adjustment data
12 manufacturing specifications, plant specs, road test data
13 including Laredo proving grounds and Los Angeles road test
14 data and mold drawings. Much more specific than the type of
15 information that we're seeing here.

16 Judge, if you take a look also at--at paragraph 154
17 of their amended complaint that I mentioned that has these
18 six items in it. It goes to the--the fundamental issue that
19 we had--had mentioned earlier which is that, they make claims
20 of both threatened misappropriation. And I think they make
21 claims of actual misappropriation, but I can't tell. And the
22 reason that that is important is that the law in the State of
23 Michigan is that allegations of threatened misappropriation
24 must have more than that the defendants had access to the
25 plaintiff's information and went to work for a competitor.

1 And if you look at what the plaintiff in this case is alleged
2 that's exactly what they've alleged. They said these guys
3 had access to Nexteer's proprietary confidential business
4 information and they went to work for Mando. That's exactly
5 what CMI International says, does not state a claim. It's
6 exactly what it says.

7 And the second thing, Judge, is that I don't see
8 anywhere leading up to their, you know, I think it's a 170
9 paragraphs or thereabouts before they actually get to a
10 Count. I don't see anywhere on those--those lead-in
11 paragraphs where there's one actual--one allegation of actual
12 misappropriation. They don't say somebody took it.

13 So fundamentally, Judge, and I'll--I'll let my
14 colleagues add anything that I might've missed. But here's
15 what we're asking for, pretty simple. We think that:

16 1. Any claim related to the 2009 contract should be
17 dismissed. And, like I say it kind of runs through their
18 many counts.

19 2. All of the claims except for the Count 6 and
20 Count 1 are preempted by the Michigan Uniform Trade
21 Secret Act.

22 3. That both the trade secret Count 6, and the
23 contract Count 1 are not properly pleaded. What we would
24 ask the Court to do is what I think I said in the motion;
25 the actual motion on the first piece is to do basically

1 two things. Dismiss our case without prejudice, allow
2 them to amend. Require them to:

3 1. Dispose of all the tort counts that claim
4 basically misappropriation.

5 2. Dispose of the contract count on the basis that
6 anything related to the 2009 contract. And,

7 3. Allow them, if they can, pursuant to the
8 requirements under the court rules that they have a
9 factual basis for doing so after reasonable inquiry, that
10 they make specific allegations against specific
11 individuals as to specific information that allegedly
12 constitutes a trade secret, and that it was--that it was
13 taken.

14 Because right now what we have is this kind of
15 global thing that you know the defendants, there's eleven
16 defendants, Judge. They say, the defendants had access to
17 this information and took this information. And that's not a
18 fair statement, Judge. That's not a fair statement for us to
19 plead in response to their complaint. And that's why I think
20 its--it's an appropriate motion on the pleadings. We're
21 entitled to more and, quite frankly, if they have complied
22 with their obligations to make a reasonable inquiry before
23 filing their complaint they should know this information.
24 And if they know this information they should state it. So
25 that's--that's our motion. I'll--I'll allow my colleagues to

1 add anything that they might have. Thank you, Judge.

2 MR. SHEA: Your Honor, good morning, David Shea on
3 behalf of the individual defendants. I want to speak to the
4 motion as it relates to them. I agree with everything that
5 Mr. Horton has--has articulated and I think he's done it
6 well. And I don't want to regurgitate what he said, so let
7 me limit my comments to these:

8 This business of the 2009 to 2010 contract, these
9 contracts, simply if you really look at them, they simply are
10 defining at a point in time what restrictive covenants
11 Nexteer wishes for the employees to operate under, so they
12 do. In 2009 they generally had three areas that they were
13 concerned about, non-solicitation, ownership of creations as
14 they call it, and confidentiality of information. They put
15 in an integration clause in the 2009 agreement. They also
16 indicated that the agreement could be cancelled which makes
17 sense because they're at-will employees. They could be fired
18 and can--this thing can be cancelled at any time.

19 In 2010 they issue another agreement. And again
20 that agreement defines the restrictive covenant that Nexteer
21 is interested that their employees must follow as part of
22 their at-will employment. And that list is narrowed down to
23 the confidentiality of information. And in fact they write
24 that letter in preparation for the sale of the company to the
25 Pacific, the Chinese company. That contains an integration

1 clause. The--the import of the integration clause is it
2 forges a backstop, so that you can't, whether you're the
3 employee or whether you're Nexteer reach back into the bin
4 from a grievance of years ago and say, oh no this is what it
5 is. That's why they put that integration clause in there and
6 that's why the law forges that backstop, it protects.

7 Because at the end of the day my clients have to know what
8 it--what their duties are as part of their employment. And
9 they rely on that 2010 agreement to tell them that. So when
10 they decide to exercise their at-will rights they decide to
11 leave, they're going to go to that 2010 contract, which is
12 written by you know the vice-president and human resources,
13 and they're going to look at it and they're going read it and
14 they're going to say, okay this is what I need to do and act
15 accordingly. So to now come in and say well we're going to
16 reach back into the bin and we're going to pull out our
17 favorite contract of the last..., I don't know, most of these
18 guys have been there for 18, 20 years, and say that's the one
19 that that..., and this one just serves as a reminder.

20 Now, you read that 2010 agreement, it doesn't
21 mention anything about 2009. So if it's simply to reiterate
22 2009 you'd think it'd be in there. But we can't talk about
23 that because we have the parol evidence rule. You got to
24 look at the four corners of the agreement, you can't go
25 beyond it. That's the beauty of the integration clause.

1 Now, I want to jump up to this the specificity
2 requirements for the pleading on the misappropriation of
3 trade secrets. Because my clients have asked me since this
4 case was filed I think back in November, What did we do?
5 What are they saying that we took? And I haven't had a good
6 answer from them in months. Now, Nexteer had 3 months to
7 figure out what they wanted to say in their complaint as to
8 what was allegedly stolen from the company. They didn't do
9 that in their complaint. They filed a motion for preliminary
10 injunctive relief or temporary injunctive relief; I don't
11 know which it was. And they had--we had a hearing, and it
12 was a long hearing, it went on all day. And again they did--
13 couldn't define what it was that they felt was
14 misappropriated. And--and in fact the Court based its
15 decision at least in part on that fact that it didn't know
16 what to enjoin because they had not identified what trade
17 secrets they were talking about. Because this is at heart a
18 trade secret case. Someone stole something. And to follow
19 up on Bill Horton's analogy, you know if someone goes into
20 your garage and steals something then you say to the police,
21 they stole my golf clubs and they stole my kid's bike and
22 they stole this and that they stole that. I don't know how
23 we defend if they're not going to tell us what it is that
24 they're talking about. And what I suspect what they're doing
25 is using this case in this courtroom as a venue to be

1 voyeuristic. To go into a competitor's office and have a
2 look around and see what they want to see, and find out how
3 they run their business, and to look in their sock drawers
4 and to look in their closets without any path of what it is
5 that they're trying to find. And what we have said time and
6 time again is tell us what it is that you are alleging that
7 we took. We--we didn't take anything. But--but make an
8 allegation. And they refuse to do that. They filed an
9 amended complaint and it isn't in there. It's a
10 regurgitation of the original complaint. So we are
11 frustrated because we don't know how to defend this case. I
12 don't know how to defend this case.

13 I use to play a practical joke when I was a college
14 students, it's really immature. But I would go and I would
15 put on a post-it note on a kid's dorm room, 'I know what you
16 did'. Okay, it's not original, other people have done that.
17 And you do that 10 times and you'll find one kid that will
18 freak out and will start telling you things that you--that
19 they have no business telling. This practical joke is a
20 variant of what Nexteer is doing in this case. They are
21 filing a complaint that says, we know what you did, now start
22 talking. And speaking for my clients I think it's incumbent
23 on these, on Nexteer to tell us, their sophisticated company,
24 tell us what it is specifically that you're worried about.
25 Don't talk about a million lines of source code that

1 supposedly in these guys head. Don't talk about con--
2 contracts or pricing or what.... Tell us specifically. And
3 please don't regurgitate back the property that we returned
4 to you, which you said that we were supposed to do in our
5 contract. I think that that Nexteer's response that, Judge,
6 the bar is so low under the law that we can just make this
7 general allegation and that's good enough. And so we're
8 going to hide behind the curtain here and we're not going to
9 tell you, instead we're going to proceed through discovery,
10 very open discovery, very liberal discovery to go into
11 Mando's house, to go into these employees' house and have a
12 look around. Thank you for your attention. Do you have any
13 questions, Judge?

14 THE COURT: I will.

15 MR. SHEA: All right. Thank you.

16 MR. KALTENBACH: Your Honor, I..., Pat Kaltenbach on
17 behalf of five of the individual defendants. And the only
18 point I wanted to make is that the people who I'm helping to
19 represent would concur with the expressions by Mr. Horton and
20 Mr. Shea. And I'd like to suggest that the purpose of this
21 Motion to Dismiss is consistent with the stated tension of--
22 of business court to expedite the litigation by coming to
23 grips very soon after the filing with the issues as they are
24 narrowed. And that's what we hope to accomplish with the
25 motion.

1 THE COURT: Mr. Watson.

2 MR. WATSON: Yes. Your Honor, I have three
3 documents; the 2010 letter, the 2009 employment agreement and
4 the Milovac affidavit which I will be referring to. I made
5 copies for the Court's convenience. Is it okay if I
6 approach? And they were all exhibits to what's been filed.
7 Is it okay for me to approach the bench and give copies to
8 the Court?

9 THE COURT: You may. I'll voice some concern about
10 the affidavit, that's beyond what I am to consider today.

11 MR. WATSON: Okay. I'll address that concern,
12 Judge.

13 THE COURT: Okay. Thank you.

14 MR. WATSON: Again, Your Honor, Jerome Watson
15 appearing on behalf of Defendant Nexteer Automotive. I agree
16 with virtually nothing said by the defendants. And I'm
17 appearing for Plaintiff, Nexteer Automotive by the way.
18 Usually Defense counsel. Hope I don't make that mistake
19 again. We submit that the Defendant's motion should be
20 dismissed in its entirety, because it is both unmeritorious
21 and it's premature, way premature. It's unmeritorious for at
22 the following general reasons and I will get into specifics.

23 First, Nexteer has filed a nine count, 60 page
24 complaint which states all the elements of each of its
25 claims. The complaint contains various factual allegations

1 supporting each one of the elements. Defendants' assertion
2 that the complaint is a mass of conclusory assertions with no
3 factual support is simply not true, Judge. There's all kinds
4 of factual support as I will get into in that complaint.

5 Second reason it's unmeritorious: Michigan is a
6 notice pleading state. Under Michigan Court Rule
7 2.111(B)(1), all that is required is that the complaint set
8 forth the allegations reasonably necessary to inform the
9 adverse party of the nature of the claims the adverse party
10 is called on to defend. And we have done that as I will get
11 into in more depth.

12 Thirdly, why its unmeritorious: MCR 2.116(C)(8),
13 this is a (C)(8) motion, a motion to dismiss based on the
14 pleadings for failure to state a claim. Under (C)(8) the
15 court only should dismiss when the claim is so clearly
16 unenforceable, so clearly unenforceable that there is no
17 factual development that could possibly justify a right of
18 recovery. In other words the standard they have meet is that
19 accepting everything we say in the complaint is true, all the
20 factual allegations and all the inferences from those
21 allegations, it's impossible for there to be facts developed
22 through discovery that would entitle Nexteer to relief. And
23 that's standard is cited in numerous different cases.

24 Fourth, well I'll stick with those three. The
25 fourth thing I wanted to mention here, Judge, is that

1 accepting all our factual allegations as true would virtually
2 doom their motion. We've alleged in the complaint that Mando
3 entered into a collaboration with Nexteer primarily starting
4 in April of 2013. This collaboration went from April to
5 Sept--to October--or April to August of 2013. Through that
6 collaboration Mando was working with Nexteer to insert
7 Nexteer's modular power pack system, the MPP system, the key
8 to Nexteer's EPS system into Mando's EPS system. So this was
9 a very important collaboration. A number of the individual
10 defendants was--were driving this collaboration, they were
11 the ones working with Mando.

12 Unbeknownst to Nexteer during this April through
13 August period Mando was collaborating, conspiring, meeting
14 with the individual defendants, trying to solicit them to in
15 effect work with Mando in Mando's surreptitious attempt to
16 establish a competing operation to Nexteer. So under the
17 agreement, the nondisclosure agreement between Nexteer and
18 Mando, Nexteer and Mando were supposedly partners during this
19 period, called each other partners. But behind Nexteer's
20 back Mando and the individual defendants, employees of
21 Nexteer, are collaborating to form a competing operation.
22 Under the court rules and under Michigan Law those factual
23 allegations have to be accepted as true. And if they're
24 accepted as true, as they must be, that dooms virtually this
25 entire motion.

1 The motion is premature because this is a case that
2 cries out for discovery. I sit and heard the defense counsel
3 talk about how in effect we're trying to hide the ball and we
4 haven't alleged enough, and we won't tell them what's going
5 on in regard to this case as far as trade secrets. We
6 submit that's not true, Judge. We've clearly alleged that
7 there were nine separate hard drives and thumb drives,
8 various information taken from Nexteer by the individual
9 defendants. Much of this information was confidential and
10 proprietary information, that's what the affidavit was about.

11 Now I know the affidavit is not considered in this
12 motion, but to sit here and listen to them saying, oh we
13 don't know what it's about when the last five paragraphs of
14 the affidavit list the trade secrets and say what the
15 information we've obtained thus far is about makes it seem
16 that they're contriving their complaints.

17 The motion is premature because we have alleged an
18 elaborate scheme under which Mando was working with the
19 individual defendants against Nexteer's best interest. This
20 scheme under the case law spawned various tort claims which
21 are valid and should not be dismissed. Plaintiff--or
22 defendants and their motions overwhelmingly rely on summary
23 judgment cases and they rely on injunction cases. Thus, when
24 Mr. Horton mentioned the *Compuware* case; that was a case
25 based upon an injunction hearing. That wasn't a case for

1 dismissal on the pleadings. There was another one he
2 mentioned. Let me find it here. The *Uniroyal* case; that
3 was a case where there was a full hearing for a permanent
4 injunction, testimony, the whole nine yards before the court
5 made a ruling. In this case not one witness has testified.
6 Not one deposition has been taken. No discovery has hardly
7 even commenced. We submit that Nexteer should be given the
8 opportunity to prove its case and not have it thrown out on
9 the basis of a standard that's stated in summary judgment or
10 injunction cases and not pleading cases.

11 Now, let me get into some of their more specific
12 contentions. As to the 2010 letters: They claim that that
13 2010 letter pretty much controls this whole matter, it's a
14 contract and it nullifies the actual 2009 agreements. We
15 submit that the 2010 letter, even if it were a contract,
16 would not supersede the terms of the 2009 agreement. That's
17 true, because the law in Michigan is that if you have two
18 contracts which cover the same subject matter and they are
19 not inconsistent the first one doesn't nullify--the second
20 doesn't nullify the first one. And especially in a case if
21 you have two contracts where the second agreement does not
22 cover all the terms of the first agreement, the second
23 agreement does not nullify the first one. In this case we
24 submit that the court under the law has an obligation to
25 interpret the two agreements as consistent with each other.

1 And I would like to spend a moment, Judge, looking at the
2 2010 what they call letter agreement.

3 If one looks at the agreement, the key clause they
4 rely upon is what they call the integration clause. The
5 third paragraph, that reads: Except the stated above, there
6 is no oral or written understanding or agreements in effect
7 regarding your salary, or nature of employment.

8 That integration clause on its face pertains to the
9 information above it and specifically says there is no other
10 oral or written understanding of agreements in effect
11 regarding your salary; that's the first paragraph that's
12 written above. Or regarding the nature of employment; that's
13 the second paragraph that's above that clause.

14 That second paragraph reaffirms the at-will
15 employment status. The integration clause doesn't mention
16 anything about confidentiality, trade secrets or anything of
17 that nature. That information, the trade secret paragraph is
18 the paragraph below the integration clause but not mentioned
19 in the integration clause. If that clause was meant to
20 pertain to confidential information or trade secrets it
21 should have been referenced in that third paragraph the
22 integration clause by word and it should've been located
23 below the fourth paragraph that discusses confidential
24 information. The letter doesn't mention creations, and the
25 letter doesn't mention non-solicitation. Both those areas

1 were covered in the first contract. So I say all this to
2 say what, Judge?

3 Number 1. The letter doesn't cover the areas that
4 the first contract covers. At least two crucial areas it
5 doesn't cover.

6 Number 2. The letter is not inconsistent with the
7 first contract. The letter just contains fewer terms
8 than the first contract. It doesn't conflict any terms.
9 And,

10 Number 3. The integration of the clau--the
11 integration clause in that letter only pertains to salary
12 and at-will employment. It doesn't say there are no
13 other agreements between employer and employee. It only
14 pertains to those two specific areas.

15 The third document I gave the Court was the first
16 contract. And I would like to look at the second page of the
17 first contract, the last two paragraphs. The second to the
18 last paragraph contains an integration clause, that reads:

19 Except as stated above, there are no other oral or
20 written understandings or agreements in effect regarding
21 my salary, nature or duration of employment, or the other
22 matters set forth in this agreement.

23 That integration clause covers everything before it
24 and thus it does cover the trade secrets, the non-
25 solicitation, the creations provision. The language is

1 different than the letter and the placement of the clause is
2 different.

3 The other thing I would like to mention is that the
4 final paragraph of the 2009 agreement reads in part: ...this
5 agreement remains in effect until its cancellation or until
6 its replacement or amended--amendment by another duly
7 executed written agreement with Steering Services
8 Corporation. So it specifically says the 2009 agreement
9 remains in effect until another duly executed written
10 agreement.

11 Judge, what does duly executed written agreement
12 mean? It seems to me what it would have to mean logically,
13 is an agreement that was executed in the same manner as the
14 2009 agreement. That agreement is signed by both the
15 employer and employee. That's duly executed. And until you
16 get an agreement signed by both the employer and employee
17 this 2009 agreement remains in effect. At a very minimum
18 looking at things from defendants' perspective what is meant
19 by duly executed could be ambiguous. But if there's any
20 ambiguity you need to go to extrinsic evidence, and thus a
21 motion to dismiss on the pleadings is inappropriate.

22 In summarizing this area, Judge, there's ambiguity
23 in regard to the integration clause and whether or not it
24 covers anything more than what it says, salary and at-will
25 employment. There is integration in regard to whether or not

1 there's ambiguity in regard to whether or not the agreement
2 has to be signed by both parties. And there's ambiguity in
3 regard to whether or not the non-solicitation and creation
4 clauses would be displaced or revoked by that 2010 letter.
5 We need extrinsic evidence on all those points to find out
6 what was intended. As a result of all that ambiguity the
7 motion to dismiss is premature and we submit it's
8 unmeritorious, because Nexteer's interpretation that the 2009
9 agreement could only be revoked by a letter signed by both
10 parties is really the reasonable interpretation.

11 One further point on the contract claim. The
12 plaintiffs say that that letter is a contract, and they cite
13 a case for that in five elements and go through all the
14 elements and all that. We don't think that letter is a
15 contract. The letter is a letter. It's a half a page letter
16 signed by Nexteer sent out to employees. They say it's a
17 contract because they went through the allegations and they
18 say they're all there. One of the allegations was mutual
19 assent. What does mutual assent mean? I think it's sort of
20 the new language, Judge. When I was an attorney what a
21 contract meant was you had to have a meeting of the minds.
22 And that's what mutual assent means. You got to have a
23 meeting of the minds to have a contract. If the parties
24 don't agree, have a meeting of the minds there's no contract.
25 There is no mutual assent as to this 2010 letter. What

1 they're trying to say is, oh Nexteer you sent out this
2 letter, it didn't have a non-solicitation provision in it.
3 It didn't have a provision that all the creations created by
4 the plaintiffs are yours in it. And therefore you revoked
5 those provisions, they are no longer enforceable. In other
6 words you took away various rights that you would have based
7 on this letter that doesn't mention non-solicitation, doesn't
8 mention creations, doesn't say in the supposed integration
9 clause that all contracts in general are integrated. It just
10 talks about at-will employment and salary. We submit that
11 there is no meeting of the minds in regard to the key terms
12 of the contract, the non-solicitation provision and the
13 creations provision. And if there's no meeting of the minds
14 there's no contract.

15 Again, looking at it from defendants' perspective,
16 at the very best for them it's ambiguous whether this letter
17 agreement applies to solicitations, the non-solicitation
18 provision or the creation provision, and therefore, summary,
19 the granting of the motion to dismiss is utterly improper.

20 Bottom line, Judge, can the defendants prove that
21 it is impossible under any interpretation of the facts for
22 Nexteer to prevail on its claim that the 2009 contract is the
23 one that basically controls? You can't say that on this
24 record. Their motion is unmeritorious and it's premature.

25 Let's go to the next argument. This argument

1 involves the breadth of MUTSA preemption. The defendants say
2 that MUTSA preempts any claim that's based on
3 misappropriation of trade secrets. And I did not like their
4 heading and don't agree with it. The heading of the reply
5 brief that reads: MUTSA preempts tort claims based all or in
6 part on trade secrets. It doesn't. That's not a true
7 statement of the law. MUTSA preempts tort claims that are
8 based solely, solely on the misappropriation of trade
9 secrets. If a tort claim is based partially on
10 misappropriation of trade secrets and partially on other
11 factors, MUTSA only preempts the portion of the tort claim
12 which is based on the misappropriation of trade secrets. The
13 rest of the tort claim is fine and can be pleaded,
14 discovered, prevailed upon. And that was made clear in
15 numerous cases, Judge. *Bliss* and *Wysong* preempts are the two
16 leading cases that make it clear that the claim would only be
17 preempted to the extent it was based solely on
18 misappropriation of trade secrets.

19 What we claim in this case and spend a lot of time
20 in our briefs doing is establishing that the various tort
21 claims we've alleged, none of them are based solely on
22 misappropriation of trade secrets. Our case falls clearly
23 under the rules stated in the *Wysong* matter which is similar
24 to the facts we've alleged here. In *Wysong* the individual
25 defendant was a consultant for the company. *Wysong* sued the

1 individual defendant and the corporate defendant claiming
2 that its consultant while the consulting contract was still
3 in effect was cooperating with the corporate defendant to
4 create a competing product line. That's similar to here
5 while the individual defendants were still employees of
6 Nexteer they were cooperating with Mando, supposedly
7 Nexteer's partner at the time to establish a competing
8 operation to Nexteer.

9 Judge Lawson, Federal District Court in Michigan
10 handled the *Wysong* claim which covered a lot of the matters
11 in this case. As to the claim for fiduciary duty Judge
12 Lawson said the fiduciary duty claim would not be preempted.
13 A fiduciary duty claim is not preempted by the Michigan
14 Uniform Trade Secrets Act because the claims are really
15 almost opposite of each other.

16 A fiduciary duty claim is based upon the defendant
17 having an obligation to report or disclose information to its
18 employer. Or, in this case the consultant to give
19 information to the principle, whereas the misappropriation of
20 trade secret claim is based upon the individual defendants
21 misappropriating or taking information from the employer.
22 They're separate duties, separate facts support those duties.
23 And MUTSA does not preempt breach of fiduciary duty claims.
24 And that's the case here, MUTSA would not preempt the breach
25 of fiduciary duty claim, nor does MUTSA preempt the breach of

1 loyalty claim. We've alleged at length in our complaint that
2 the individual defendants had an obligation to their
3 employer, Nexteer to disclose the fact that Mando while
4 supposedly cooperating with Nexteer was secretly trying to
5 set up an operation to compete with Nexteer was soliciting
6 various Nexteer employees to assist in this operation and was
7 not acting in good faith with Nexteer, was doing stuff to
8 harm Nexteer. And employees have a duty of loyalty to their
9 employer and they were supposed to disclose that. They were
10 working for Nexteer every day and getting paid by Nexteer.
11 So in *Wysong* the court rule fiduciary duty claim is not
12 preempted. It's not preempted here.

13 *Wysong* also looked at the claims of unjust
14 enrichment and conspiracy. We've got similar claims here.
15 And the court rule to the extent those unjust enrichment and
16 conspiracy claims were based on creating a competing product
17 line, they were not preempted and not dismissed. To the
18 extent they were based on misappropriate--misappropriating
19 trade secrets, they were preempted and dismissed.

20 Here we have a case where we've alleged a scheme
21 based upon secretly working together to establish a
22 competitive operation. The claim just does not preempt,
23 preempt that either the conspiracy claim or the unjust
24 enrichment claim.

25 Just on pages 18 through 21 of our brief we go

1 through at length how each one of our counts are based that
2 each one of the tort claims are based on matters in addition
3 to alleged taking of information. Most of them are based
4 upon this surreptitious scheme I'll call it, and upon the
5 breach of the non-solicitation provision. I could go through
6 all those but like Mr. Horton, I don't want to go through all
7 that. But we do allege for each and every one of our tort
8 claims and, we were careful to do this, Judge, that there
9 based upon more than just mere misappropriation of trade
10 secrets.

11 Mr. Horton mentioned the conversion claim and that
12 that was especially weak he said. And we're just alleging
13 through conversion misappropriation of trade secrets. What
14 we are saying is that there was a surreptitious attempt to
15 basically convert the entire Nexteer modular power pack
16 section. There have been double figures employees hired by
17 Mando from that section. They plan to basically duplicate or
18 convert Nexteer's entire operation. There are a lot of
19 intangible opportunities that we think they're trying to
20 convert like business opportunities, business plans, the
21 layout of the operation, the setup of the machinery,
22 everything that has to do converting an entire operation of
23 an entity and that's much broader than just converting trade
24 secret information.

25 There's also a point I would like to make at this

1 time because there is a real conflict in Michigan Law in
2 regard to the breadth of MUTSA preemption. Under the statute
3 MUTSA only preempts claims that are based on the
4 misappropriation of trade secrets. That's the wording of
5 the, pretty much the wording of the statute. That's what
6 MUTSA preempts. However, an issue has developed. What about
7 taking information like creations? The creations we've
8 alleged, the work product these various defendants produced
9 are not trade secrets. There was a contractual provision
10 that they couldn't take any of that stuff. What about the
11 taking of the creations which aren't trade secrets, would
12 that be preempted by MUTSA? And we say it is not so
13 preempted because the language of MUTSA only preempts
14 misappropriation of trade secrets. Now there's a split of
15 Michigan authority on this. The defendants rely on the *Bliss*
16 case, Federal District Court decision in *Bliss* which said:
17 MUTSA not only preempts the taking of trade secret
18 information but also information that doesn't rise to the
19 level of a trade secret. We cite the *McKesson* case which was
20 decided I believe at the same time as the *Bliss* case. In the
21 *Appalachian Railcar* case which was decided in 2008, 5 years
22 after *Bliss* which both say that if you misappropriate
23 information that misappropriation of information that doesn't
24 rise to the level of a trade secret claims based on such
25 misappropriation are not preempted. That's a decision for

1 this Court to make. We rely on the express language of the
2 statute, the *McKesson* case, the *Appalachian Railcar* case for
3 the proposition that information like these creations that
4 don't rise to the level of trade secrets is not impacted by
5 MUTSA and claims based upon misappropriation of nontrade
6 secret information are not preempted.

7 Nevertheless, Judge, whatever way you go on that
8 based upon what we've alleged in our complaint in regard to
9 preemption and our claims that our tort claims are all based
10 on more than simply misappropriation of trade secret
11 information, plaintiff's motion should be denied. Again,
12 the test is is there any factual development which could
13 possibly support plaintiff's recovery in this case. We
14 submit that there absolutely is and for that reason
15 defendants' motion has got to be denied.

16 The next argument, well the unjust enrichment was
17 mentioned that MUTSA would preempt the unjust enrichment
18 claim. Basically that's the same argument again. We're
19 alleging this surreptitious scheme by the defendants and that
20 states a claim that's not preempted by MUTSA, according
21 *Wysong* face the same argument and the court says to the
22 extent that this creation of the competing product line is
23 alleged and unjust enrichment claim based on that is not
24 preempted here to the extent this surreptitious scheme was
25 entered into to basically secretly establish an operation to

1 compete with MUTSA and that results an unjust enrichment of
2 the defendants. That claim is not preempted.

3 They say the unjust enrichment claim has to be
4 dismissed because there are contracts. Nexteer had contracts
5 with both Mando and the individual defendants. They don't
6 say, however, that doctrine only applies when the contracts
7 cover the same subject matter. The contract between Mando
8 and Nexteer, that nondisclosure agreement covered some things
9 like protecting each side's information. It didn't cover a
10 scheme where Mando surreptitiously plotted with Nexteer's
11 employee to set up an operation to compete with Nexteer.
12 The contract covers a different subject matter than the one
13 we're talking about. The fact that a contract was not
14 mentioned in *Wysong* does not mean that in *Wysong* the same
15 subject matters were covered. So we don't think the same
16 subject matters were covered, the contract claim should not
17 be dismissed. And the fact of the matter, Judge, is no
18 discovery has been done. No depositions taken. No
19 interrogatories exchanged. We need more information to flesh
20 out some of these claims so we can present what exactly the
21 claims--claims are. That's another big problem that we have
22 with the defendants' motion.

23 This isn't a case where there is some smoking gun,
24 trade secret, like the secret formula for Coke that the
25 individual defendants took with them. This is a case where

1 we know they took boxes of information, they took nine hard
2 drives and thumb drives and there was all types of
3 information on that. But we don't know for sure how they're
4 using it. We haven't been able to find out what they're
5 doing every day at work or any of that information. And when
6 defendants say that, gee all this should've been alleged in
7 the complaint, the fact of the matter, Judge, is everything
8 was done surreptitiously here. What happened was the
9 conspiring of Mando and the individual defendants happened in
10 April through August of 2013. Mando pulled out of the
11 agreement, the nondisclosure agreement, this sort of joint
12 venture in August of 2013. On September 4th, 2013 weeks or
13 perhaps days later 10 of these individual defendants started
14 leaving. By September 13 all 10 of them were gone. That's a
15 9 day period. We didn't know what they took. We didn't know
16 why they left. We just know they left in unison over a very
17 short period of time. We were in the dark about a lot of
18 things.

19 The next argument, and this ties into what I was
20 saying is that plaintiffs contend the trade secret claim was
21 too--defendants contend a trade secret claim was too vague
22 that we didn't identify the trade secrets specifically
23 enough. We submit that we have identified it pretty much as
24 specifically as we can.

25 As to threatened misappropriation, the defendants

1 claim that we have only alleged the existence of trade
2 secrets and that defendants now work for a competitor. We've
3 alleged a lot more than that. And in fact we think this
4 argument borders on the frivolous, Judge. We allege that
5 defendants misappropriated Nexteer's proprietary EPS program
6 including MPP technologies. And the way the EPS components
7 and software are put together, are programmed and are tuned,
8 we allege that the individual defendants had access to and
9 they took misappropriated portions of the source code,
10 various drawings and specifications, supplier pricing,
11 contracts, Nexteer pricing and the terms and conditions of
12 Nexteer contracts. We've cited cases in our brief which
13 indicate that all these areas under the liberal pleading
14 standards which the courts in Michigan apply, all these areas
15 constitute categories for valid misappropriation claims.

16 We pointed out to the Court the liberal pleading
17 standards and under the caselaw this state in trade secrets
18 cases like this one the plaintiff has an obligation to put
19 defendants on notice of what the trade secrets are. We don't
20 have an obligation to prove our case in the complaint. That
21 happens through discovery. We have an obligation to let them
22 know basically what we're talking about and we've given them
23 adequate notice of cause--of our cause of action. They can
24 take discovery and further specificity can be achieved
25 through discovery. What they're trying to do is say, gee

1 you've got to totally identify every trade secret in your
2 complaint otherwise we can't function in this case. We
3 reject that as untrue. They can depose folks. They can ask
4 for documents. They can take depositions. And as I stated,
5 Judge, we already submitted the affidavit of Mr. Milovac
6 which does list five specific trade secrets and it talks
7 about them at some length. So they know basically what we're
8 talking about currently. The nature of this case however is
9 such that we really don't know for sure everything they took
10 or how they're using it. As far as we know every day they
11 could be using Nexteer trade secrets. We know they're
12 working on Mando's EPS system. We know they got a big
13 increase in pay to go to work for Mando. We don't know
14 exactly what they're doing. Again, it's way premature to
15 dismiss our claim. They've been given information that they
16 need to continue on with discovery of this case.

17 As to the threaten misappropriation claim, that's a
18 claim that was argued at some length before. Again they say
19 that all we've alleged is that these employees worked for
20 Nexteer and had accessed information and now they work for a
21 competitor. We've alleged a lot more than that. We've
22 alleged the whole scheme where Mando and the individual
23 defendants surreptitiously worked together while Mando was
24 Nexteer's partner, and the individual defendants were
25 Nexteer's employees to create a competing operation and that

1 spawns a lot of claims and that's duplicitous behavior.
2 We've alleged that the employee we know about who began
3 working for Mando, whose wage we know about, got a 90 percent
4 increase to go to work for Mando. Under case authority
5 that's evidence of duplicitous behavior. We've alleged that
6 the way these employees left Nexteer, no notice, didn't
7 apprise their supervisors they were leaving, went to
8 Nexteer's HR and basically said we're out of the door, seem
9 to be operating in unison, all left over 9--all 10 left over
10 a 9 day period, well-coordinated attempt, seem to be geared
11 to do the most harm to Nexteer. We submit that that's
12 evidence of duplicitous behavior. We've asserted that two of
13 the employees when asked whether or not they were going to
14 leave Nexteer, two of the individual defendants said, oh no,
15 we're not leaving; a day or two later they were gone. Under
16 the case authority that's evidence of duplicit--duplicitous
17 behavior. And perhaps most importantly, Judge, we've
18 asserted that they took various Nexteer information with them
19 and their counsel has admitted they took that information
20 with them. Now, counsel says, oh there is no harm, you
21 returned, they returned all the information. They did return
22 it, but they took a lot of information and they didn't return
23 it until we demanded it back. And by taking it they breached
24 the provisions of that 2009 agreement. All of that we submit
25 constitutes duplicitous behavior clearly states a threatened

1 misappropriation claim. And again is it impossible under any
2 version of these facts for Nexteer to prove its
3 misappropriation claims? Absolutely not. We've alleged
4 facts which if we can prove certainly would support a claim
5 for a misappropriation.

6 Mr. Shea made a number of points; perhaps I've
7 covered most of them. If you'll bear with me, Your Honor.
8 He said the import of the integration clause in the 2010
9 letter is such that you just can't reach back to an agreement
10 that favors you and say that your relationship is based on
11 that agreement. But the fact of the matter is, the Court has
12 an obligation when presented with two agreements to try to
13 construe the agreements consistently with each other. That's
14 clear under the caselaw. And that I think the primary rule
15 of statutory construction if entities have two different
16 agreements, if they're consistent with each other and both
17 can be enforced, the courts first obligation is to go ahead
18 and do so. So his claim that this Court can't reach back to
19 the 2009 agreement does not really comport with the law. In
20 fact the opposite the court's agreement is to construe
21 different agreements to be consistent with each other if they
22 can reasonably do so.

23 As to the specificity requirements: I've argued
24 that there's no special statute that governs misappropriation
25 claims. Fraud claims have to be pled with specificity, not

1 misappropriation claims. Its notice pleading and we've given
2 them notice of where we're coming from and they know that.

3 The final matter with the protective order: I
4 think that was mentioned. And what the defendants want to do
5 is to have the Court, their all discovery, except on the
6 plaintiff's Nexteer claim of misappropriation. And
7 specifically that we should have to tell them all information
8 we know about any trade secrets and no discovery should take
9 place except for that. And my response to that, Judge, is
10 why? Why? Why would we need to take discovery that way?
11 Why can't they take their discovery, we take our discovery at
12 the same time like you do in every other case? We've alleged
13 various claims in addition to misappropriation, trade secret
14 misappropriation. And in fact even the trade secret
15 misappropriation I don't see why discovery cannot take place
16 simultaneously. They state in their brief that generally
17 courts require the plaintiff to disclose information on trade
18 secrets before other discovery. I haven't seen any Michigan
19 case that says that, and they didn't cite any Michigan case
20 that said that. In their brief near the end of their first
21 brief they cited a number of cases on page 17 of their first
22 brief supposedly for the proposition that we should have to
23 disclose all information on Nexteer trade secrets before
24 they're subjected to any discovery. Those cases don't stand
25 for that proposition. What those cases stand for is the

1 proposition that when a plaintiff seeks to discover a
2 defendants trade secrets, it should first have to reveal its
3 own trade secrets. We're not trying to discover their trade
4 secrets. So, none of those cases is really applicable to our
5 situation. And we haven't seen any case in Michigan that
6 talks about staying discovery so that the defendant can find
7 out everything it can about trade secrets before we find out
8 anything.

9 And the other troubling part of that motion, Judge,
10 is something I touched on before. The nature of this case is
11 such that Nexteer really doesn't know everything that's going
12 on. We know these folks left all of a sudden. We know right
13 after Mando pulled out of this collaboration within a matter
14 of weeks or days it hired these people and they started
15 working for Mando. We believe they're doing the same type
16 things for Mando they did at Nexteer. But we don't know what
17 use they're making of the various information they took and
18 the various knowledge they have in regard to Nexteer's trade
19 secrets. We know there's an obligation they had under the
20 creations clause and the non-solicitation clause and the
21 trade secret clauses of the 2010 agreement that they weren't
22 supposed to share anything with Mando once they left or any
23 other employer once they left Nexteer. But we really don't
24 know exactly what they're doing and we need to find that out.
25 We're entitled to find it out. And when we do find it out

1 we'll be in a better position ourselves to further state our
2 trade secret--secrets that we're relying upon. Until then
3 we've stated as much as we can.

4 In summary, Judge, I always talk too long, probably
5 talk too long. This is not a simple case. There are nine
6 counts, there are various claims, we've alleged a lot of
7 stuff, we've alleged an elaborate scheme. We submit that we
8 should be entitled to take discovery to try to prove our case
9 and the intent to prevent us from even getting involved in
10 discovery based primarily on relying--reliance on summary
11 judgment and injunction cases is both unmeritorious and
12 premature. Thank you.

13 THE COURT: Mr. Horton.

14 MR. HORTON: Thank you, Judge. In essence what--
15 what the plaintiff says here is that there is a conspiracy to
16 compete and there's duplicitous behavior. And so they're
17 curious and they'd like to go fishing. Generally, Judge,
18 here's the rule in the United States and specifically in
19 Michigan is that, employees are free to compete with their
20 prior employer. In fact, they're free to prepare to compete
21 while currently employed with the plaintiff, Hayes-Albion.
22 And they are free to take their general skills and knowledge
23 and go anywhere they want with them and related to his point
24 regarding to the money for any amount that they can get.
25 That's the way it works in America. Now what he says is that

1 this is some scheme to compete with them. They hired the guy
2 from TRW. Ford, GM, Chrysler, they're competing every day.
3 That's what we do in America. Companies compete. And as
4 long as we take our general skills and knowledge and not
5 trade secrets and things of that nature then we're entitled
6 to do so.

7 So let me go into a couple of things. And this is
8 where I said in my reply brief, and I'm going to say it
9 again, Judge. Is that, what the plaintiff does is glosses
10 over the specificity that we provided to you or ignores the
11 facts. Let me give you an example..., counsel stood here and
12 said the *Wysong* case is the big case on breach of fiduciary
13 duty and exactly the same circumstances that we have here
14 there is a breach of fiduciary duty. Wrong. I've got the
15 case right here. I cited it to you and gave you chapter and
16 verse in the--in the reply brief. Here is what happened to
17 *Wysong* and I'll read it to you. There were two defendants,
18 there was M.I. Industries and there was a Mr. Freeman. Mr.
19 Freeman was an agent of the plaintiff. And the court said
20 Freeman's relationship with plaintiff was different. Under
21 principles of agency, an agent owes his principle of duty of
22 good faith, loyalty and fair dealing. Not so with defendant
23 MI. There is no evidence of a relationship that the law
24 recognizes is giving rise to a duty of loyalty or a fiduciary
25 obligation. Quote:

1 Summary judgment on this court will be granted as to
2 MI but denied as to Freeman.

3 And that's the distinction that the case makes.
4 And that's the distinction that we make. Freeman was an
5 agent. None of these folks were agents. You have to in
6 order to assert that fiduciary duty you either have to be a
7 corporate director or officer. They don't make any
8 allegation where you got to hit one of those four prongs
9 under the Michigan Supreme Court case, they do none of them.
10 And so when counsel stands up here and gives you these
11 generalities it simply isn't true. I've got the cases if
12 you'd like to see them.

13 Let me--let me talk to you about a little bit about
14 the contract. Here's what he says. You know if we really
15 wanted to nullify the prior, the agreements prior to 2010 we
16 would've made reference to them. That's exactly what people
17 don't do, Judge. And you've been around long enough. That's
18 exactly why you make the generality. You say, here's our
19 deal and anything else is gone. And that's exactly what
20 they said. And that's what I would've done too quite
21 frankly. If I was at Nexteer I would've said here's our new
22 deal and I don't care what--what our dealings were in the
23 past but those are nullified. And that's what they did. And
24 that's what they did on the 2009 contract if you take a look
25 at that. That's what they did in the 2010 contract. That's

1 what makes sense. That's what business people do. That's
2 what they did here.

3 Now, what counsel tries to say is that he tries to
4 scoot on this, he tries to say, oh these--these terms are
5 ambiguous. But that isn't a proper use of that term.
6 Ambiguous means that the terms conflict. In other words you
7 have a document I refer to one provision here and it
8 conflicts with another provision there. Quite frankly, I was
9 the victim of that in that *Calhoun County versus Blue Cross*
10 case that cited. I was the losing party on that. I claimed
11 ambiguity. I went and tried the case. I won the case. It
12 goes to the Court of Appeals, the Court of Appeals reversus
13 me and says that wasn't ambiguous, it should have never gone
14 forward. And that's exactly what it is here. Simply because
15 he says, I think, Judge, my interpretation of these words
16 duly executed or nature of employment conflict with Horton's
17 definition of those terms doesn't mean it's ambiguous. It
18 means we just viewed the--we're just arguing the--those terms
19 differently. Unless there is a conflict in those terms, the
20 term is not ambiguous and it's a legal call for the court.

21 Now one of the things that he said about this duly
22 execute, he said well you know our guys didn't sign it. We
23 performed. It says here's what you have to do going forward
24 and we did, and we cited cases to that that continued at-will
25 employment constitutes acceptance. And, you know, Judge, the

1 other thing is that I cited the--the case or the statute to
2 you that says that it only, when there's a modification of an
3 existing contract it only has to be signed by the party
4 against whom it is to be enforced. That's them. That's the
5 plaintiff.

6 On, you know, on a couple of these items on
7 preemption. Again, I'm going to refer the Court to the
8 *Wysong* case. And counsel says that that it--it's got to
9 preempt the entire count or none at all. It's exactly the
10 opposite of what *Wysong* case says. And I quoted exactly what
11 the--what the court said in there. And it says where there
12 are independent claims and preemption claims the pre--or I'm
13 sorry and trade secret claims the trade secret claims are
14 preempted and the independent claims go forward. What
15 happened in *Wysong* is they made a specific allegation of
16 usurpation of a corporate opportunity. Plaintiff hasn't done
17 so in this case. And what the *Wysong* court said you kind of
18 roll them all up together, so what I'm going to do is I'm
19 going to dismiss the--the trade secret case and let the
20 corporate opportunity portion of that count go forward. And
21 this is literally what it says: This is base quote, "...on the
22 wrongful taking of *Wysong's* corporate opportunity and theft
23 of secret information, and consequently are displaced in
24 part." And that's what he did. He excised out the trade
25 secret information. And when you do that, Judge, and that's

1 what I'm saying is that, and you know by the way, I know I
2 said this once before. We cited chapter and verse, the
3 paragraph numbers in their--in their complaint. We said do
4 you want to talk about this count, here's the--here's the
5 paragraph numbers. Here's what they say: You took
6 confidential information. You took proprietary information.
7 You took secret information. Nowhere do they respond in
8 either orally or in their brief with any kind of paragraph
9 numbers that indicate that that is not true. So when you
10 strip out the confidential information or trade secret
11 information allegations from all those other counts, what
12 you're left with is nothing. Zero. There isn't anything
13 left in those tort counts. There isn't anything left over.
14 So they are preempted, they go away. And they also should be
15 dismissed for the other reasons that I've mentioned.

16 You know I do want to just touch on a couple of
17 additional items, Judge, and I know we've been at this for
18 some time. Is that counsel argues that there's a difference
19 between confidential and trade secret information. I don't
20 think so. You know first he argues that it's the definition
21 of confidential under the contract count. Well that may be
22 under the contract count. MUTSA only preempts tort claims.
23 And the contract count is a contract count not a tort claim.
24 But the if--if it's a tort count and it claims any kind of
25 information, the information has to have value and has to be

1 a trade secret. If I just say you know the yellow pages are
2 confidential, it doesn't in fact mean they are and indicate
3 that you have been injured in any way.

4 You know on the unjust enrichment count, Judge, the
5 contracts..., the law is pretty clear. The law is extremely
6 clear. If you and I have a contract you have to sue on the
7 contract and you can't sue on unjust enrichment because
8 unjust enrichment is basically a gap filler when it would
9 otherwise be inequitable to allow the relationship to
10 dissolve because there isn't a consensual relationship like a
11 contract between the parties. But there is a consensual
12 relationship between all the parties in this case. They have
13 the 2010 agreement and plaintiff and Mando has an agreement.
14 When you have an agreement you either got to sue on the
15 agreement or you can't sue on the unjust enrichment. I think
16 a hundred years' worth of says that, Judge. And when they
17 say well it doesn't cover exactly the same subject matter.
18 It's not true. What both of those contracts say among other
19 things is that any information that we disclose to you, that
20 secret, you got to keep it confidential. If we breached it,
21 sue on the contract. If we didn't, don't sue, because you
22 can't sue on the unjust enrichment. The acquisition of the
23 information under which a complain occurred under the
24 contract, either there's a breach or there's not, but you
25 can't sue on the unjust enrichment.

1 Judge, just on the--just emphasize again one, one
2 additional point. The plaintiff says well we, you know you
3 can deal all with this in discovery but I don't think that's
4 what the Michigan Court of Appeals says. The Michigan Court
5 of Appeal said in CMI International if you--if you want to
6 claim threat and misappropriation you got to claim more than
7 access and go into a competitor. And if you look at page,
8 counsel was going through these questions. But he glossed
9 over the important words that they used. They used. They
10 wrote the complaint. 154; All of Nexteer's engineers have
11 access to a tremendous amount of trade secret and
12 confidential business information including..., and then they
13 list those six items. That's exactly what they claim, Judge,
14 they claim the "access to". And that's exactly what CMI
15 International says does not state a claim. So and--and,
16 Judge, I know it goes without saying, but obviously you can't
17 consider the affidavit, this is a (C)(8) motion. And I'll
18 allow my colleagues to if they have anything additional to
19 add to that. Thank you, Judge.

20 MR. SHEA: Your Honor, if I boil this case down to
21 its very essence. Ten guys decide that they no longer can
22 tolerate working at their present employment and they decide
23 to leave. They look to their employment contract, and their
24 employment contract tells them that to the extent that they
25 have property, they need to return it back to the employer.

1 They do in fact return it back to the employer. Three months
2 goes by and their former employer comes and follows a lawsuit
3 and calls all of them thieves. For since November, although,
4 they seem to exercise some courage in calling these 10 people
5 thieves and continue to call them thieves today, they don't
6 exercise the corresponding courage of telling them what they
7 stole. And that's what this case should be about. At some
8 point in time they need to tell us what it is that they're
9 accusing them of stealing. And I have yet, I've sat and
10 listened to 45 minutes of oral argument here. We've been
11 through countless numbers of--of hearings and pleadings and
12 what have you and I don't know one thing that they have
13 alleged that these guys have stole before calling them
14 thieves. What we're asking for is that, if they are going to
15 call them thieves at least let's tell the Court and tell the
16 public, since they make these public filings what it is that
17 they stole. Thank you.

18 MR. KALTENBACH: Your Honor, just briefly. We're
19 never going to get to the end of the story if in fact we
20 don't specifically look at the pleadings and make some
21 judgment on whether they're satisfactory by law. And to do
22 what's been done in this multipage complaint and again and
23 again repeat paragraph 120, Upon information and belief,
24 Mando and the individual defendants did something or another.
25 124, Upon information and belief, who is encouragement of

1 this and that and the next thing.

2 And then 131, Upon information and belief, so and so took
3 some information with them and might be using it.

4 178, Upon information and belief, is discussed the individual
5 defendants potentially done this that and the other thing.

6 I understand what Mr. Watson is suggesting, its--
7 he's saying its notice pleading, its liberal pleading. Don't
8 try to deal with the statutory or caselaw today, we'll go
9 through discovery because these people are doing things
10 fictitiously, we don't really know exactly what they might be
11 doing. We have nine counts and various claims. And let us
12 just do our discovery. And then we'll figure it all out and
13 someday we'll come back and we'll try the lawsuit. We're
14 never going to get through this in a hurry if that's the way
15 it's going to be done. And I thought the whole purpose of
16 the Business Court was to try to ferret out what's going on
17 early on. And I think that's the duty of all of us to try to
18 do it rather than obfuscate and just say maybe something at
19 the end of the day will be relevant important factually.
20 That's my view of it and I think that's why we've done the
21 Motion to Dismiss. And Mr. Horton, Mr. Shea specifically
22 noted statutes and caselaw and there should be an answer to
23 the questions raised by the motion.

24 MR. WATSON: Judge, if I could have just a couple
25 minutes. I'll be quick. As far as the employers being free

1 to compete, we agree. Employers and employees should be free
2 to compete but they have to do so in a way that doesn't
3 violate various tortious obligations. Breach various
4 tortious duties if they're having duty to the company of
5 loyalty, and behind the company's back they're doing things
6 to destroy the company. That's going to create a tort. And
7 we have the right to sue for that and that limits that
8 freedom of opportunity to compete. We all can compete but
9 certain things you can't do.

10 As to the *Wysong* case, I think Mr. Horton's summary
11 kind of proves my point. The Freeman guy in *Wysong* was the
12 consultant, the individual. That claim for unjust enrichment
13 continued against him. The company was M.I. that was a
14 corporate defendant. The claim against the corporate
15 defendant was dismissed. We haven't even sued the corporate
16 defendant Mando for breach of fiduciary duty in this case.
17 We've sued the individuals for breach of fiduciary duty.
18 They're the ones that owed the fiduciary duty. The whole
19 area of fiduciary duty is a pretty complicated one, but it's
20 well discussed in the *Wysong* case. And in *Wysong* the court
21 said that breach of fiduciary duty occurs when a fiduciary
22 relationship which arises from the reposing of faith,
23 confidence and trust and the reliance of one upon the
24 judgment and advice of another is--is abused or when
25 confidence has been reposed and betrayed. We've alleged

1 clearly in this case that these guys were high ranking
2 officials. They had access to all of Nexteer's most secret
3 information. They were entrusted with designing and making
4 changes in Nexteer's key products and in fact innovating for
5 the future of those products. They were the ones in charge
6 of making changes to improve the product in the future.
7 That's key to Nexteer in this very competitive industry.
8 Nexteer reposed a tremendous amount of faith, confidence,
9 loyalty in these folks and then they're secretly plotting
10 with a competitor behind Nexteer's back. We think they did
11 breach a fiduciary duty. And at the very best for defendants
12 there is a fact question where there needs to be discovery
13 conducted on that.

14 As to the contract claim, Mr. Horton says, well,
15 there was an integration clause saying here's the deal and
16 anything else is gone. There was an integration clause but
17 it didn't say here's the deal and anything else is gone. The
18 integration clause says, this clause applies to salary, and
19 nature of employment which is identified is at-will
20 employment. It didn't apply to anything else. If it didn't
21 apply to anything else, the non-solicitation, creations,
22 everything else is left. At best again for defendants we
23 need to find out more about that. What was the intent of the
24 parties in regard to that? Certainly it wasn't Nexteer's
25 intent that that half a page letter revoked its right to

1 enforce a non-solicitation or creation provision. That
2 wasn't its intent. But we can't really get into that because
3 there's no discovery in this. This is a motion the
4 pleadings.

5 Mr. Horton said, well ambiguous means the terms
6 conflict. I don't think that's true. I think ambiguous
7 means it's ambiguous. You don't know what it means. It
8 could mean this. It could mean that. The integration clause
9 could mean one thing or another thing. The clause that says
10 this agreement can only be changed by in effect the..., let me
11 get it right here ...by another duly executed written agreement
12 with Steering Services Solutions. Does that mean an
13 agreement that's got to be signed by both parties at the same
14 time like this one was? Or does it mean something else? It
15 could mean one thing or the other. That's ambiguous to me.

16 Again, the mutuality of agreement: There was no
17 mutuality of agreement because Nexteer never agreed to what
18 defendants claim the contract, the letter agreement means.
19 Counsel says I don't know what they're argument on preemption
20 is exactly. I know what the law says; a claim is not
21 preempted unless it's based solely on misappropriation of
22 trade secrets. And all our claims are based at least in
23 part, most of it, of them principle part, all the tort claims
24 and stuff in addition to misappropriation of trade secrets.
25 *Wysong, Bliss* are very very clear on that, Judge.

1 As to the unjust enrichment claim. If there--Mr.
2 Horton says, well if there's a contract you can't sue for
3 unjust enrichment. That's only if the contract and the
4 unjust enrichment claim cover the same subject matter. I can
5 have a contract with anybody. A guy could come up and slap
6 me in the face, I can sue him. That contract doesn't stop me
7 from suing. If there's an employment contract that says
8 they're at-will employees and they get involved in a
9 surreptitious scheme to harm Nexteer they can be sued for
10 unjust enrichment to the extent this surreptitious scheme
11 results in the defendants being enriched to the tune of a lot
12 of dollars. The contract claim wouldn't let you sue for
13 those damages.

14 I want to point out that at least 40 percent of the
15 employees in Nexteer's operation was taken. Nexteer's future
16 engineering group operation, were taken by Mando. 40
17 percent. There was an effort to decimate that entire
18 operation. And then Mr. Shea says well they won't tell us
19 what they stole. I know we're not supposed to get in other
20 stuff. But one--one of the points is they know what they
21 stole because they stole it. Part of it was the nine hard
22 drives and thumb drives we demanded they return. They know
23 they stole that. The three boxes of--two boxes of
24 information that I had to look through, they know they stole
25 that. And we did submit the affidavit of Mr. Milovac listing

1 the key trade secrets and a portion of the stuff they took;
2 that Mr. Milovac says he's very concerned about and
3 utilization would hurt the company. So this whole crying
4 about, oh we don't know what they took and we can't defend.
5 That's falling on deaf ears for me, Judge. It really is.

6 Finally Mr. Kaltenbach and I appreciate him because
7 he's always short. He goes last and he doesn't say too much
8 but it's always cogent. The information and belief
9 allegations, I don't think that can be held against us in
10 this case because we're claiming this was surreptitious
11 activity and we just don't know everything that happened.
12 And under the pleading standards anything in the complaint
13 that we allege, or the inferences from what we allege..., so
14 even if you say, that oh the information and belief, I'm not
15 really counting that so much. But we cannot only depend on
16 the facts but the inferences from those facts, that's clear,
17 Judge, very clear in the caselaw. And the information and
18 belief would, areas would be covered by the fact that we can
19 rely on inferences.

20 And finally, the purpose of the business court. I
21 know the purpose of the business court is to handle these
22 cases quickly. You can get complicated cases, a special
23 court to handle the cases. Frankly, Judge, seeing how you
24 work and every time I've been here you've been working after
25 5 O'clock, I'm not sure that sending cases to someone that

1 busy was supposed to be what happened with the business
2 court. But be that as it may, and you have devoted a lot of
3 time to this I know. The purpose of a business court is not
4 to give short shrift to cases. We've alleged a pretty
5 complicated case here. We've alleged a lot of facts here.
6 We're entitled to full analysis of our case. And again their
7 claims are really quite premature to try to dismiss it. This
8 is a notice pleading state. They've got plenty of notice of
9 our claims. Thanks.

10 THE COURT: With caution I'll open it up one last
11 time. Any last words?

12 MR. HORTON: Thank you for the opportunity, but no,
13 Your Honor.

14 THE COURT: Let's take a short break.

15 (At 12:26 p.m., court in recess)

16 (At 12:46 p.m., court reconvened)

17 THE COURT: We're back on the record on Nexteer
18 Automotive versus Mando Corporation. Before the record began
19 I had some, a short meeting with counsel in chambers and
20 also made some opening comments back here on the bench,
21 indicating my--my attempt this morning or this afternoon now
22 will be to--to give some preliminary ideas on where I'm going
23 on this case, but not give finality on most of the motion.
24 I've identified both the, the court rule and the standard by
25 which MCR 2.116(C)(8) motions are to be considered.

1 In discussing first the misappropriation claim, I
2 was going to ask Mr. Watson to identify for the Court if you
3 can just in general. Is this a claim in which you claim
4 actual misappropriation as we sit here? Or is it a case of
5 threatened misappropriation only?

6 MR. WATSON: Judge, we're claiming both actual
7 misappropriation of trade secrets with stuff that was
8 actually taken, which we believe has been admitted. And then
9 threatened misappropriation for the reasons I detail.

10 THE COURT: Thank you. So as far as the motion
11 today there seem to be two general categories to address, one
12 is the particularity of the trade secrets and then the
13 sufficiency of the allegations of misappropriation.

14 The case of *Dow Corning versus RSI Silicon*
15 indicates that in trade secrets cases there's a relatively
16 low bar. Seems to be in accord with the--with MCR 2.114(B)--
17 excuse me, 2.111(B)(1), that:

18 A statement of facts, without repetition, of which
19 the pleader relies in stating to cause of action, with
20 the specific allegations necessary reasonably to inform
21 the adverse party of the nature of the claims the adverse
22 party is called on to defend.

23 In this case in paragraph 154, objections by
24 defendants is notwithstanding, they've identified A through F
25 what they're complaining about, no more. Source code,

1 drawings and specifications, supplier pricing, contracts,
2 Nexteer pricing, terms and conditions of Nexteer's work.

3 There is a legitimate concern within this broad
4 framework. Tell us what it is that truly of what you're
5 talking about. If I were a defendant I may want more.
6 You've at least under the case in which a low bar is set have
7 identified in generality at least what we're talking about.
8 It isn't ideal, but it tends to put the other side on notice
9 what this case is about.

10 The Defendants argue that the allegations of
11 misappropriation itself are too generalized, conclusory.
12 Particularly are they arguing that the fact that Mando
13 employees the individual defendants who have knowledge of
14 plaintiff's trade secrets are insufficient to support a
15 misappropriation claim, citing CMI. My reading of both CMI
16 and MC--MSC Software, those are both threatened
17 misappropriation cases in which yes you do need to allege
18 something more than just my employee went from here to here
19 and he has trade secret knowledge. So the question becomes
20 here, since at least that much has been stated is, Have they
21 pled something more? The untrustworthiness, duplicity,
22 deceit that I think are required for the threat and
23 misappropriation. Defendant argues, well we have all of
24 these, all the circumstantial evidence, the direct evidence
25 perhaps of the personal property that was taken,

1 circumstantial evidence of everyone leaving at once. For the
2 reasons Mr. Watson indicated we would at least put on the
3 table for pleading purposes enough to get by, dismissal
4 motion. Not without reservation I tend to agree.

5 As to the non-solicitation claims and the friction
6 between the 2009 employment agreement and the 2010 letter.
7 I think we could probably recite these in our sleep. The
8 2010 letter is uneven at best. I'm not sure the right term
9 to use. When you read it on its own in a vacuum it is not,
10 it doesn't flow necessarily, it doesn't make, it doesn't seem
11 complete on its face. The second paragraph for whatever
12 reason in italics. This reaffirms that you are an at-will
13 employee and your employment is from month to month; day to
14 day, if you are in orientation and development period. I
15 start out with the first two words, "this reaffirms". This
16 reaffirms what? Why would I have to reaffirm anything?
17 Reaffirming I would think means relates back to something
18 else. It reaffirms something previous. It goes on to say
19 that you are an at-will employee. On its face an at-will
20 employee is just that, at-will. Here today gone tomorrow.
21 You're at-will. But it continues on, and you're employment
22 is from month to month. And then inexplicably, but day to
23 day if you're in orientation and development period.

24 When I then go back and read the 2009 employment
25 agreement it--it puts it better into context because the 2009

1 agreement talks about those very things. It talks about
2 being an at-will employee if you're beyond your probation
3 period it's on a month to month basis. We won't terminate
4 you today and tomorrow, you get at least a month notice. But
5 if you're on probation, yeah, you're still on day to day.
6 It at least if you relate it back to the prior agreement it--
7 it gives it some flesh on the bones.

8 Then there's an integration clause that if properly
9 drafted I think may do exactly what the defendants want.
10 Its--it's drafted perhaps intentionally, but it's drafted
11 with some limitations, specifically as to salary and nature
12 of employment.

13 The 2009 agreement does tend to address some more
14 things that surprisingly aren't including here. But does the
15 nature of employment constitute everything that is involved
16 in the employer/employee relation? I don't see how the 2010
17 letter does that. There's nothing about, not that it has to
18 be, but I just, just talking out loud, there's nothing about
19 vacation, personal leave, medical insurance, retirement. If
20 I'm simply an at-will employee and I have nothing other than
21 what the 2010 letter says, you would be a relatively limited
22 engagement. 2010 agreement doesn't mention some of these
23 things either surprisingly. But anyway I'm trying to
24 reconcile the two and I'm finding some ambiguity.

25 Interpretation of unambiguous fully integrated

1 contract is a question of law to be--to be determined by the
2 court. But when contract language is ambiguous or where when
3 reasonable persons could disagree, the matter should be
4 resolved at trial. Accordingly an--excuse me, accordingly an
5 ambiguous contract that requires factual development
6 precludes dismissal on the pleadings.

7 And for your reference the cases that I am using
8 for that is *Auto Club versus Lozanis*, 215 Mich App 415.
9 *Klapp versus United Insurance Group*, 468 Mich 459. *Zinchook*
10 *versus Turkewycz*, 128 Mich App 513. And the *Ajuba* case
11 referenced by I think it was a plaintiff in pleadings at 871
12 Fed Supp 2d 671.

13 There's also another case that I found helpful,
14 although, unpublished. *Allord versus Wiser*, Court of Appeals
15 docket number 239777, decided December 11th, 2003,
16 specifically addressing the integration clause issue where it
17 was found wanting.

18 So on this issue I am if not past the line, I'm
19 certainly up to the line of deciding that for purposes of
20 pleading I think the anti-solicitation clause stays in.

21 Now, for those of you who--who were here at the TRO
22 Hearing, in which, I rather abruptly disallowed Mr. Watson to
23 argue that. In--in that context, in which he was asking for
24 extraordinary relief without any evidence and there was some
25 uncertainty on what the 2009, and 10 agreements, which one

1 controlled. It seemed to me that I could not grant
2 injunctive relief based on something that just as today
3 would've been ambiguous at best. And in this case I'm simply
4 saying, I'm not saying it wins, but that for pleading
5 purposes I think it survives.

6 On the MUTSA preemption of tort claims. MUTSA does
7 not displace contractual claims or claims otherwise not based
8 on misappropriation of trade secret. It also does not
9 displace claims that are based on wrongful conduct that is
10 independent of trade secret misappropriation, but questions
11 whether the claim is predicated on allegations of trade
12 secret misappropriation.

13 So hopefully you each have your copy of the amended
14 complaint. And I think this is where we walk through the
15 complaint and see what it says.

16 Count 2, tortious interference with business
17 relations and business expectations as against all
18 defendants. The elements of tortious interference with a
19 business relationship are:

20 1. The existence of a valid business relationship or
21 expectancy that does not necessarily predicated on an
22 enforceable contract.

23 2. Knowledge of the relationship or expectancy on
24 the part of the defendant interfere.

25 3. An intentionally interference by the defendant

1 inducing or causing a breach or termination of a
2 relationship or expectancy. And,

3 4. Resulting damage to the party whose relationship
4 or expectancy was disrupted.

5 Those are the elements of that claim. I think the
6 challenge is to find out in the complaint are those
7 allegations stated independent of a MUTSA, MUTSA claim. So
8 it talks about the business relationship and expectancies
9 with employees and customers in paragraph 175.

10 177, the defendants and Mando knew of Nexteer's
11 relationships. 178, Mando has intentionally and improperly
12 interfered with--with the individual defendants, Nexteer's
13 employees. And has induced or caused Nexteer employees to
14 abruptly resign and bring their various creations with them
15 to collaborate with Mando. That last paragraph in 179 to me
16 sounds an awful lot like misappropriation of trade secrets.
17 From 174 to 178 you're working up toward, it seems the
18 elements of the cause of action independent of the trade
19 secrets. So Mr. Watson if we take away paragraph 179, I
20 guess would you agree 179 is displaced by MUTSA?

21 MR. WATSON: I'd agree it's, it could be displaced
22 in part, Judge, the part that talks about creations. But
23 then later in 179 I also say-- or we also say, to persuade
24 other employees to join them in working for Mando in
25 violation of their contractual obligations. That's in

1 violation of the non-solicitation provision. That isn't
2 preempted by MUTSA. To collaborate with Mando in effort to
3 convert Nexteer's MPP section or future engineering to
4 Mando's use. And that gets into that whole, what we call
5 surreptitious scheme where they were, Mando and the
6 individuals were working together to set up this competing
7 operation. And we don't think that's preempted by MUTSA. So
8 to the extent I could go along with the creations because
9 creations is information that could be trade secrets or not
10 rise to the level, but to the extent it relies on
11 solicitation or surreptitious actions I don't think it--it
12 should be preempted. So I could, I would say part should
13 remain.

14 THE COURT: Okay. So fair enough. So let's say we
15 go that far. But then if we go to your prayer for relief,
16 paragraphs 1B through F seem to be all about I want relief on
17 trade secrets. That would be inconsistent with the claim.

18 MR. WATSON: I would say that's pretty accurate,
19 Your Honor. What I did and, maybe I shouldn't, shouldn't
20 have done this. I put the same prayer for relief in every
21 count. So to sort of save time. What I could've done is
22 just separately put in each count, the relief that only
23 pertains to that specific count. And if I'm not basing this
24 interference with contract on MUTSA, I shouldn't have put any
25 in this particular count any sort of trade secret relief. So

1 I could agree that I should've taken out of the prayer for
2 relief any damages which are pertinent to trade secret claims
3 and not pertinent to claims for interference with contract.

4 THE COURT: But you could see why it puts wind in
5 the sails of the argument that it's really a trade secret
6 claim.

7 MR. WATSON: I do.

8 THE COURT: Okay.

9 MR. WATSON: I could revise that, Judge. And I
10 should--

11 THE COURT: But then when we go--

12 MR. WATSON: --have taken the time to..

13 THE COURT: Okay. So go to paragraph 2 then.

14 MR. WATSON: ...be more careful.

15 THE COURT: When we go to paragraph 2B talks about
16 unjust enrichment, C talks about Quantam Meruit, and D talks
17 about trouble damages for conversion. Those would be
18 similarly perhaps inapplicable.

19 MR. WATSON: Yes, there's no trouble damages on an
20 interference with contract claim, only on a conversion claim.

21 THE COURT: So where I am on this count is that
22 subject to the discussion, it's generally independent of the
23 trade secret claim because it's talking about interfering
24 with employees and that sort of thing.

25 MR. HORTON: Judge, can I--can I pipe in one word

1 here? Is that, you know he's got 2 is interference with
2 business relationship, 3 is interference with contract. You
3 can't say contract in both places. And that's what he does
4 in 179. Part of his claim is on trade secrets and part of it
5 is on contract. Well you can make that allegation in the
6 contract count but not in the business relationship count,
7 because that's the whole, that's one of the elements is that
8 there's a business relationship that doesn't arise to a
9 contract.

10 THE COURT: I was aware that it didn't require a
11 contract. I wasn't aware that a contract precluded the
12 claim.

13 MR. HORTON: You can't have them both is all I'm
14 saying. Is that if you, you know you can't have redundant
15 counts. You just can't recite the same count over and over
16 which is basically what 2 and 3 would then be.

17 MR. WATSON: Well in 2 I assert a claim against
18 everyone for interference with business relationship. 3 is
19 kind of different because I assert a claim against Mando.
20 They interfered with the contract, so it's not quite the
21 same.

22 THE COURT: That was an issue frankly I had not
23 addressed. Moving onto Count 3, if we could. The elements
24 for this are: Existing of a contract, breach of the contract
25 and an unjustified instigation of the breach by the

1 defendant. So we look at the allegations. And when I look
2 at 187 it jumps out as a trade secret allegation. Same with
3 189. Same with 190. This claim to me does not appear as
4 independent as Count 2, at least as pled. And then the
5 prayer for relief, many of the same concerns I had previously
6 and this one in particular because Count 3 is against only
7 Mando. Sub A talks about the individual defendants in
8 paragraph one. And then the prayer for relief just talks
9 about my same concerns about trade secrets remain as well as
10 in the paragraphs in 2B. So I'm less inclined to--to favor
11 Count 3 surprisingly.

12 Count 4, breach of fiduciary duty. As argued by
13 Mr. Watson a claim for breach of fiduciary duty is the
14 opposite of misappropriation. A breach of fiduciary duty
15 contemplates withholding or concealment of information or
16 activities whereas the essence of misappropriation is the
17 theft of the information. I tend to think on this count
18 beginning on page 45 of the complaint that it's efficiently
19 independent. However, with the same concerns about the
20 prayer for relief.

21 Count 5, is aiding and abetting of the breach of
22 fiduciary duty against Mando. And this has elements that
23 include an independent wrong exist as would in any aiding and
24 abetting case, that the aider and abettor knew of the wrong's
25 existence and that substantial assistance was given to effect

1 a--to effecting the wrong. And I think it's Hayes-Albion
2 that says Michigan law does provide for a cause of action for
3 aiding and abetting the breach of fiduciary duty. So
4 theoretically such a cause of action does exist. And my
5 reading of the count seems to be sufficiently independent
6 that it would survive subject to the concerns about the
7 prayers for relief.

8 Skipping over to Count 7, unjust enrichment and
9 quantum meruit. The dominant theme here seems to be
10 misappropriation. You can read the paragraphs to yourselves,
11 it just seems to me that its--it's what it's all about.

12 Count 8, conversion. My initial read is that this
13 is a MUTSA claim under different label and not independent.
14 To the extent there was personal property taken, *Bliss*
15 *Clearing* I think resolves that issue in favor of the
16 defendants.

17 Count 9 on conspiracy. Interesting footnote in the
18 plaintiff's pleadings, footnote 12: To the extent this count
19 alleges that the individual defendants misappropriated
20 Nexteer trade secrets. Nexteer agrees that such portion of
21 the conversion claim is displaced. So I think we have to go
22 through and find out which portions are offensive. 233, talks
23 about copy and duplicating, converting Nexteer's operations
24 and information. Sounds like MUTSA. And 234 sub F: To
25 convert the information and operations. And H: To wrongfully

1 obtain Nexteer's--Nexteer's expertise. My suspicion is the
2 conspiracy claim is--is a throwback to all of the other
3 claims. And if--if I stated a claim here then I'm saying
4 it's been a conspiracy between them all, between all of the
5 defendants.

6 MR. WATSON: That's basically what was intended,
7 Judge. My understanding would be that you can conspire to
8 commit a tort to the extent you would dismiss certain of the
9 tort claims, the conspiracy claim to commit that tort would
10 be dismissed as well to the extent the tort claim remains
11 there could be a conspiracy claim that the two entities or
12 however many entities conspired to commit the tort.

13 THE COURT: So then moving on to the other
14 deficiencies that were raised by the defendants. On unjust
15 enrichment, my understanding of unjust enrichment is that as
16 somebody mentioned it's a gap filler. When I--when I don't
17 have a contract and the party with whom I'm dealing with has
18 been unjustly enriched, the court will imply and an implied
19 in law contract or a quasi-contract to avoid the unjust
20 enrichment. In this case each of the individual--individual
21 defendants have a contract, a contract that says you can't
22 disclose information. Everything that the plaintiff wants to
23 receive unjust enrichment for to me arises out of the
24 disclosure of information either in violation of the contract
25 or violation of the statute. So you can't have them both.

1 As to Mando, they don't have a, any relationship that the
2 unjust enrichment theory would fill, they're a competitor.
3 I'm--I'm struggling and it's may be my shortcoming, how you
4 claim unjust enrichment against somebody who's effectively a
5 legal stranger. May be there's a way to do it. I'm just
6 struggling with it. So for those reasons unjust enrichment
7 falls even if it survives under the trade secret act.

8 Count 8, on conversion. On this one, on the--on
9 the pleading aspect of the argument I'm a little uncertain
10 myself. It may be a moot point because I think on conversion
11 I said there was no claim anyway, it was displaced. Suffice
12 it to say that there has been a growth of what can be
13 converted beyond tangible personal property in caselaw. I'm
14 not sure if its extended this far but it may be a moot point
15 given my prior ruling.

16 Breach of fiduciary, duty which although I think I
17 indicated may survive under MUTSA. I'm--I'm struggling with
18 how an employee in an employee/employer relationship
19 magically gets elevated into a fiduciary without his or her
20 knowledge or expectation. They may be a long term employee,
21 they may be a higher level employee, they may have unique
22 knowledge, but to make them a fiduciary is further than I'm
23 willing to go at this point. To do so would--would make
24 every employee not just I think five of the defendants, but
25 each of them that had much of the same unique knowledge and

1 you're suing them for violation of trade secrets. It's
2 either one of them or all of them. And the other engineers
3 who have left but who have not even been sued, where is the
4 line drawn as to who is a fiduciary and who is not? If I'm a
5 fiduciary from the time I walk in the door at or at some
6 point in my evolution and no one gives me the cards saying
7 fiduciary, when does that happen? When am I not allowed to
8 leave my employer because I'm now a fiduciary? When can't I
9 even talk to a prospective employer about a change of
10 employment even if it has nothing to do with EPS and MPP? It
11 just runs counter to you know what we're taught from
12 childhood. This is a free society and subject to certain
13 limitations you should be able to go and do things that are
14 appropriate. So I just don't see how you become
15 automatically a fiduciary.

16 That's about as far as I've gone in my analysis.
17 It doesn't give you a lot of direction. It gives you some.
18 There may be things that--that I need to still--still hear
19 and be persuaded to give me finality. How we do that is
20 going to have to wait to, until a different day. Hopefully
21 you've each taken notes of my predispositions. I'd like one
22 of you to summarize that for circulation among everybody so
23 we can identify, including myself so I can go back and
24 understand what I've been saying: These are the issues that
25 the judge thinks have been resolved, these remain unresolved

1 but he's predisposed this way. What am I missing? If I'm
2 making palpable errors I want to nip it in the bud before I
3 make it. Otherwise I'm getting pretty close to resolving
4 this. Obviously this is very complicated stuff, at least for
5 me it is. I want to do it right. I want to do, do right by
6 you. I just need perhaps a little more time and education.

7 MR. HORTON: Can I just make a suggestion as to my
8 experience in life, as that once lawyers walk out of the--the
9 courtroom without a schedule that it drifts. I don't know if
10 you have ever had that experience. I would suggest that we
11 kind of circulate some stuff among ourselves, get something
12 to you sometime next week. If we can't agree as to..., and
13 like we're trying to formulate not what we believe but what
14 we believe we heard you say. So Mr. Watson., myself, my
15 team, we--we'd sit down and take a look at this. Try to come
16 up with something and say we agree on one, we don't agree on
17 two, we agree on three, we don't agree on four, whatever it
18 might be and--and submit it to you by next Friday.

19 THE COURT: That's fine.

20 MR. HORTON: Does that work?

21 MR. WATSON: Yeah. That--that works for me, Judge.
22 And I think it would be fairly easy for us to write down what
23 you've said, put it in the form of some type of document and
24 agree upon it.

25 MR. HORTON: It's got to end up as an order

1 somewhere along the line.

2 THE COURT: My goal is to bring resolution as soon
3 as practicably possible. We're not even out of the garage
4 yet with this car. We haven't get--got pass pleadings. I'm
5 very sensitive to plaintiff's position, although, they may
6 not have brought the certainty and specificity that a
7 defendant wants. They feel wronged. Given the circumstances
8 I can understand at least emotionally why they want to get
9 their hands around it. But how much damage has been done, if
10 any? So I'm trying to get to some resolution so we can get
11 the car out of the garage sooner than later. I think I made
12 this comment in chambers too: even if..., strike it. I won't
13 go there.

14 So if we can do this, if I can get something by
15 next week. And if you can talk among yourselves also that
16 even if you can't expect the Judge to bring finality as soon
17 as you could if you resolved certain issues yourselves the
18 case may still go forward without resolution of everything,
19 but at least it gets going forward, and I think that's my
20 goal at this point.

21 MR. WATSON: What I'm hoping that we could do,
22 Judge, is it's pretty easy to know which way you're going on
23 which issues and decide amongst ourselves which one of those
24 we both agree on the issues that we both agree with your
25 opinion and or won't oppose even if we don't totally agree on

1 it.

2 THE COURT: And even if you don't agree with it is
3 it worth investing another--

4 MR. WATSON: Right.

5 THE COURT: --200 pages to--to persuade on.

6 MR. WATSON: Right.

7 MR. HORTON: Here would be my suggestion, is that
8 we work among ourselves and what we would submit to you next
9 Friday would be something in a draft order form. So that we
10 say look we agree on number one, you're good on that. On
11 number two, we don't agree. And we say Judge you've got to
12 resolve number two. Number three, we agree. Number four,
13 whatever it might shake out to be.

14 THE COURT: That's fine.

15 MR. HORTON: The second thing I guess I would ask
16 is that I would ask you to consider, not today because I know
17 you've got a full afternoon, our request on the protective
18 order. That doesn't have to be today.

19 THE COURT: Well, at this point I think the--the
20 limitation of case management order I guess just continues
21 temporarily.

22 MR. HORTON: Yeah.

23 THE COURT: I do have some predispositions on that.
24 too. I'm not sure if it's going to be productive if I share
25 it today or not.

1 MR. WATSON: Yeah, we're pretty ready to get
2 started--

3 THE COURT: It may--

4 MR. WATSON: --with the depositions.

5 THE COURT: It may taint your discussions on the
6 others.

7 MR. HORTON: Well why don't we get that resolved
8 first then and leave the case management order in place until
9 we get that resolved.

10 THE COURT: Okay. Forgive me if I've rambled a
11 little bit. It's, I'm trying to keep going forward. Again--

12 MR. HORTON: Appreciate your time and attention,
13 Judge.

14 THE COURT: --I want to express my appreciation to
15 each of you, very nice job today. It's given me a lot to
16 think about. If there's nothing else we're adjourned.

17 MR. HORTON: Thank you, Judge.

18 MR. WATSON: Thank you, Judge.

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21 (At 1:26 p.m., proceeding concluded)

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1 STATE OF MICHIGAN)
2 COUNTY OF SAGINAW)

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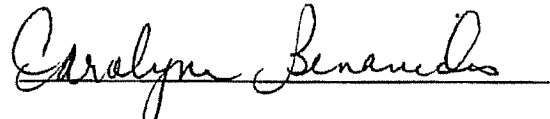
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I certify that this transcript, consisting of 86 pages, is a complete, true, and correct transcript, of the Motion to Dismiss proceedings and testimony taken in this case on Friday, January 24, 2014.



CAROLYNN BENAVIDES CER 8145
Certified Electronic Recorder
111 S. Michigan Avenue
Saginaw, MI 48602
(989) 790-5365

Dated: May 13, 2014

EXHIBIT N

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation,

Plaintiff,

v.

MANDO AMERICA CORPORATION, a
Michigan corporation, TONY DODAK,
ABRAHAM GEBREGERGIS,
RAMAKRISHNAN
RAJA VENKITASUBRAMONY, CHRISTIAN
ROSS, KEVIN ROSS, TOMY SEBASTIAN,
THEODORE G. SEEGER, TROY STRJETER,
JEREMY J. WARMBIER, and SCOTT
WENDLING, jointly and severally,

Defendants,

Case No. 13-021401-CK

And

Hon. M. Randall Jurens (P27637)

CHRISTIAN ROSS, KEVIN ROSS, TOMY
SEBASTIAN, THEODORE G. SEEGER and
TONY DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation, LAURENT
BRESSON, and FRANK LUBISCHER,

Counter/Third-Party Defendants.

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**STIPULATION TO STAY COUNTER/THIRD-PARTY PLAINTIFFS' CLAIMS PENDING
 FURTHER ORDER OF THE COURT**

WHEREAS, on May 8, 2014, Defendant Mando America Corporation ("Mando") filed a motion for leave to amend its answer to Plaintiff Nexteer Automotive Corporation's ("Nexteer") First Amended Complaint and to compel arbitration of all Nexteer's claims;

WHEREAS, Nexteer opposed Mando's motion to compel and believes that the matter should stay with the trial court;


WHEREAS, the Court entered an Order compelling arbitration on August 22, 2014;

WHEREAS, on July 3, 2014, Christian Ross, Kevin Ross, Tomy Sébastian, Theodore G. Seeger and Tony Dodak (collectively, the "Counter/Third-Party Plaintiffs") filed their First Amended Counterclaim and Third-Party Complaint against Nexteer; and

WHEREAS, the Counter/Third-Party Plaintiffs have agreed to stay their claims.

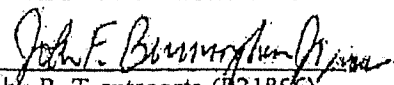
IT IS SO ORDERED that Counter/Third-Party Plaintiffs' claims are stayed pending further order from this Court.

Date: SEP 03 2014

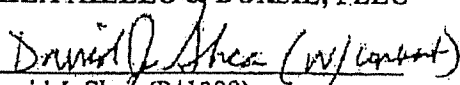

M. Randall Jurens, Circuit Court Judge

NOTICE OF ENTRY WAIVED

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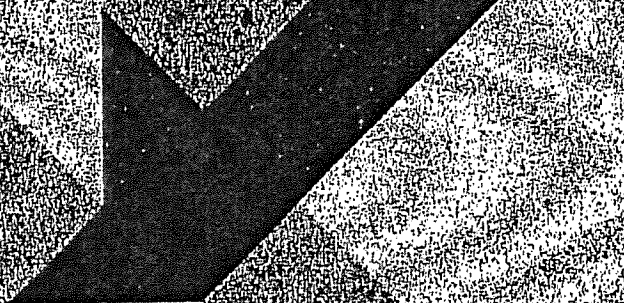
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Susan Kaltenbach, Clerk

EXHIBIT O

ARBITRATION RULES

Rules of Arbitration of the International
Chamber of Commerce

In force as from 1 January 2012



**ICC ARBITRATION RULES
INTRODUCTORY PROVISIONS**

ARTICLE 1

International Court of Arbitration

- 1 The International Court of Arbitration (the "Court") of the International Chamber of Commerce (the "ICC") is the independent arbitration body of the ICC. The statutes of the Court are set forth in Appendix I.
- 2 The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules").
- 3 The President of the Court (the "President") or, in the President's absence or otherwise at the President's request, one of its Vice-Presidents shall have the power to take urgent decisions on behalf of the Court, provided that any such decision is reported to the Court at its next session.
- 4 As provided for in the Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision is reported to the Court at its next session.
- 5 The Court is assisted in its work by the Secretariat of the Court (the "Secretariat") under the direction of its Secretary General (the "Secretary General").

ARTICLE 2

Definitions

In the Rules:

- (i) "arbitral tribunal" includes one or more arbitrators;
- (ii) "claimant" includes one or more claimants, "respondent" includes one or more respondents, and "additional party" includes one or more additional parties;
- (iii) "party" or "parties" include claimants, respondents or additional parties;
- (iv) "claim" or "claims" include any claim by any party against any other party;
- (v) "award" includes, *inter alia*, an interim, partial or final award.

ARTICLE 3

Written Notifications or Communications; Time Limits

- 1 All pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat.
- 2 All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.

ICC ARBITRATION RULES INTRODUCTORY PROVISIONS

- 3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2).
- 4 Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 3(3). When the day next following such date is an official holiday, or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

ICC ARBITRATION RULES
COMMENCING THE ARBITRATION

ARBITRATION

ARTICLE 4

Request for Arbitration

- 1 A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.
- 2 The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration.
- 3 The Request shall contain the following information:
 - a) the name in full, description, address and other contact details of each of the parties;
 - b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;
 - c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
 - d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
 - e) any relevant agreements and, in particular, the arbitration agreement(s);
 - f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;
 - g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
 - h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

ICC ARBITRATION RULES COMMENCING THE ARBITRATION

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 4 Together with the Request, the claimant shall:
- submit the number of copies thereof required by Article 3(1); and
 - make payment of the filing fee required by Appendix III ("Arbitration Costs and Fees") in force on the date the Request is submitted.

In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.

- 5 The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required filing fee.

ARTICLE 5

Answer to the Request; Counterclaims

- 1 Within 30 days from the receipt of the Request from the Secretariat, the respondent shall submit an Answer (the "Answer") which shall contain the following information:
- its name in full, description, address and other contact details;
 - the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;
 - its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;
 - its response to the relief sought;

ARBITRATION

- e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
- f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 2 The Secretariat may grant the respondent an extension of the time for submitting the Answer, provided the application for such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice and, where required by Articles 12 and 13, the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with the Rules.
- 3 The Answer shall be submitted to the Secretariat in the number of copies specified by Article 3(1).
- 4 The Secretariat shall communicate the Answer and the documents annexed thereto to all other parties.
- 5 Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:
 - a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;
 - b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims;
 - c) any relevant agreements and, in particular, the arbitration agreement(s); and
 - d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.

ICC ARBITRATION RULES COMMENCING THE ARBITRATION

The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 6 The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Secretariat. Prior to the transmission of the file to the arbitral tribunal, the Secretariat may grant the claimant an extension of time for submitting the reply.

ARTICLE 6

Effect of the Arbitration Agreement

- 1 Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.
- 2 By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.
- 3 If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

ARBITRATION

4 In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:

(i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist; and

(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

5 In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.

6 Where the parties are notified of the Court's decision pursuant to Article 6(4) that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not, and in respect of which of them, there is a binding arbitration agreement.

ICC ARBITRATION RULES
COMMENCING THE ARBITRATION

- 7 Where the Court has decided pursuant to Article 6(4) that the arbitration cannot proceed in respect of any of the claims, such decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.
- 8 If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.
- 9 Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.

ICC ARBITRATION RULES
MULTIPLE PARTIES, MULTIPLE CONTRACTS
AND CONSOLIDATION

ARBITRATION

ARTICLE 7

Joinder of Additional Parties

- 1 A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such Joinder shall be subject to the provisions of Articles 6(3)-6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.
- 2 The Request for Joinder shall contain the following information:
 - a) the case reference of the existing arbitration;
 - b) the name in full, description, address and other contact details of each of the parties, including the additional party; and
 - c) the information specified in Article 4(3), subparagraphs c), d), e) and f).

The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.
- 3 The provisions of Articles 4(4) and 4(5) shall apply, *mutatis mutandis*, to the Request for Joinder.
- 4 The additional party shall submit an Answer in accordance, *mutatis mutandis*, with the provisions of Articles 5(1)-5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.

ICC ARBITRATION RULES
MULTIPLE PARTIES, MULTIPLE CONTRACTS
AND CONSOLIDATION

ARTICLE 8

Claims Between Multiple Parties

- 1 In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)-6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).
- 2 Any party making a claim pursuant to Article 8(1) shall provide the information specified in Article 4(3), subparagraphs c), d), e) and f).
- 3 Before the Secretariat transmits the file to the arbitral tribunal in accordance with Article 16, the following provisions shall apply, *mutatis mutandis*, to any claim made: Article 4(4) subparagraph a); Article 4(5); Article 5(1) except for subparagraphs a), b), e) and f); Article 5(2); Article 5(3) and Article 5(4). Thereafter, the arbitral tribunal shall determine the procedure for making a claim.

ARTICLE 9

Multiple Contracts

Subject to the provisions of Articles 6(3)-6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

ARBITRATION

ARTICLE 10

Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

- a) the parties have agreed to consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

ICC ARBITRATION RULES
THE ARBITRAL TRIBUNAL

ARTICLE 11

General Provisions

- 1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
- 2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
- 3 An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.
- 4 The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.
- 5 By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.
- 6 Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

ARBITRATION

ARTICLE 12

Constitution of the Arbitral Tribunal Number of Arbitrators

- 1 The disputes shall be decided by a sole arbitrator or by three arbitrators.
- 2 Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

Sole Arbitrator

- 3 Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Three Arbitrators

- 4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

ICC ARBITRATION RULES
THE ARBITRAL TRIBUNAL

- 5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.
- 6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.
- 7 Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13.
- 8 In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

ARBITRATION

ARTICLE 13

Appointment and Confirmation of the Arbitrators

- 1 In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).
- 2 The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.
- 3 Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.
- 4 The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:
 - a) one or more of the parties is a state or claims to be a state entity; or

ICC ARBITRATION RULES
THE ARBITRAL TRIBUNAL

- b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
 - c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.
- 5 The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

ARTICLE 14

Challenge of Arbitrators

- 1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
- 2 For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
- 3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

ARBITRATION

ARTICLE 15

Replacement of Arbitrators

- 1 An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.
- 2 An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.
- 3 When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.
- 4 When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.
- 5 Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

ICC ARBITRATION RULES
THE ARBITRAL PROCEEDINGS

ARTICLE 16

Transmission of the File to the Arbitral Tribunal

The Secretariat shall transmit the file to the arbitral tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

ARTICLE 17

Proof of Authority

At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.

ARTICLE 18

Place of the Arbitration

- 1 The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.
- 2 The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.
- 3 The arbitral tribunal may deliberate at any location it considers appropriate.

ARTICLE 19

Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

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ARTICLE 20

Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

ARTICLE 21

Applicable Rules of Law

- 1 The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
- 2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.
- 3 The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

ARTICLE 22

Conduct of the Arbitration

- 1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
- 2 In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

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- 3 Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
- 4 In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
- 5 The parties undertake to comply with any order made by the arbitral tribunal.

ARTICLE 23

Terms of Reference

- 1 As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:
 - a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;
 - b) the addresses to which notifications and communications arising in the course of the arbitration may be made;
 - c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
 - d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;
 - e) the names in full, address and other contact details of each of the arbitrators;
 - f) the place of the arbitration; and

- g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.
- 2 The Terms of Reference shall be signed by the parties and the arbitral tribunal. Within two months of the date on which the file has been transmitted to it, the arbitral tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.
- 3 If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference have been signed in accordance with Article 23(2) or approved by the Court, the arbitration shall proceed.
- 4 After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

ARTICLE 24

Case Management Conference and Procedural Timetable

- 1 When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.

**ICC ARBITRATION RULES
THE ARBITRAL PROCEEDINGS**

- 2 During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.
- 3 To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.
- 4 Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.

ARTICLE 25

Establishing the Facts of the Case

- 1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
- 2 After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.
- 3 The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

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- 4 The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.
- 5 At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.
- 6 The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

ARTICLE 26

Hearings

- 1 When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.
- 2 If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.
- 3 The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.
- 4 The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.

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ARTICLE 27

Closing of the Proceedings and Date for Submission
of Draft Awards

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

- a) declare the proceedings closed with respect to the matters to be decided in the award; and
- b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 33.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

ARTICLE 28

Conservatory and Interim Measures

- 1 Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.
- 2 Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

ARTICLE 29

Emergency Arbitrator

- 1 A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.
- 2 The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.
- 3 The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.
- 4 The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.
- 5 Articles 29(1)-29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.

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- 6 The Emergency Arbitrator Provisions shall not apply if:
 - a) the arbitration agreement under the Rules was concluded before the date on which the Rules came into force;
 - b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
 - c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.
- 7 The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.

ICC ARBITRATION RULES
AWARDS

ARTICLE 30

Time Limit for the Final Award

- 1 The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2).
- 2 The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

ARTICLE 31

Making of the Award

- 1 When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.
- 2 The award shall state the reasons upon which it is based.
- 3 The award shall be deemed to be made at the place of the arbitration and on the date stated therein.

ARTICLE 32

Award by Consent

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

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ARTICLE 33

Scrutiny of the Award by the Court

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

ARTICLE 34

Notification, Deposit and Enforceability of the Award

- 1 Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.
- 2 Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.
- 3 By virtue of the notification made in accordance with Article 34(1), the parties waive any other form of notification or deposit on the part of the arbitral tribunal.
- 4 An original of each award made in accordance with the Rules shall be deposited with the Secretariat.
- 5 The arbitral tribunal and the Secretariat shall assist the parties in complying with whatever further formalities may be necessary.
- 6 Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

ARTICLE 35

Correction and Interpretation of the Award; Remission of Awards

- 1 On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
- 2 Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.
- 3 A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 31, 33 and 34 shall apply *mutatis mutandis*.
- 4 Where a court remits an award to the arbitral tribunal, the provisions of Articles 31, 33, 34 and this Article 35 shall apply *mutatis mutandis* to any addendum or award made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.

ICC ARBITRATION RULES COSTS

ARTICLE 36

Advance to Cover the Costs of the Arbitration

- 1 After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the Terms of Reference have been drawn up. Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 36.
- 2 As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 36(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 36(2) shall be payable in equal shares by the claimant and the respondent.
- 3 Where counterclaims are submitted by the respondent under Article 5 or otherwise, the Court may fix separate advances on costs for the claims and the counterclaims. When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims.
- 4 Where claims are made under Article 7 or 8, the Court shall fix one or more advances on costs that shall be payable by the parties as decided by the Court. Where the Court has previously fixed any advance on costs pursuant to this Article 36, any such advance shall be replaced by the advance(s) fixed pursuant to this Article 36(4), and the amount of any advance previously paid by any party will be considered as a partial payment by such party of its share of the advance(s) on costs as fixed by the Court pursuant to this Article 36(4).

- 5 The amount of any advance on costs fixed by the Court pursuant to this Article 36 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share.
- 6 When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding.
- 7 If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters.

ARTICLE 37

Decision as to the Costs of the Arbitration

- 1 The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.
- 2 The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.

ICC ARBITRATION RULES COSTS

- 3 At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
- 4 The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
- 5 In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.
- 6 In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

ICC ARBITRATION RULES
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ARTICLE 38

Modified Time Limits

- 1 The parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.
- 2 The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 38(1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.

ARTICLE 39

Waiver

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

ARTICLE 40

Limitation of Liability

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

ARTICLE 41

General Rule

In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.